

Supreme Court, U. S.
FILED
MAY 12 1977
MICHAEL BOONAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1976.

No. **76-1581**

ABRAHAM E. FREEDMAN,

Petitioner,

v.

HONORABLE A. LEON HIGGINBOTHAM, JR., Judge of the
United States District Court for the Eastern District of
Pennsylvania,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

MARTIN J. VIGDERMAN,
CHARLES SOVEL,
FREEDMAN, LORRY, VIGDERMAN,
WEINER AND SOVEL,
Lafayette Building, 8th Floor,
Philadelphia, Pa. 19106

Counsel for Petitioner.

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
The Decision Below Denies the Unqualified Right to Preserve an Objection on Appeal, Contrary to This Court's Decisions in <i>Maness v. Meyers</i> , 419 U. S. 449, and <i>Sacher, et al. v. United States</i> , 343 U. S. 1, Which Hold That the General Rule of Obedience to the Trial Judge's Ruling Does Not Come Into Play Until After Counsel Has Preserved His Point for Appeal	6
CONCLUSION	11

TABLE OF CITATIONS.

Cases:	Page
<i>Maness v. Meyers</i> , 419 U. S. 449	6, 7, 8
<i>Matter of McConnell</i> , 370 U. S. 230 (1962)	9
<i>Morrissey, et al. v. National Maritime Union, et al.</i> , 544 F. 2d 219 (2d Cir. 1976)	9
<i>Offutt v. United States</i> , 348 U. S. 11	6
<i>Sacher, et al. v. United States</i> , 343 U. S. 1	6
Statutes:	
Federal Rules of Criminal Procedure, Rule 42(a)	2
28 U. S. C. § 401	2
28 U. S. C. § 1254(1)	2

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976.

No. _____

ABRAHAM E. FREEDMAN,

Petitioner,

v.

HONORABLE A. LEON HIGGINBOTHAM, JR.,
JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

*To the Honorable, The Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Petitioner, Abraham E. Freedman, Esquire, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered herein on February 7, 1977.

OPINIONS BELOW.

The Order, Findings and Commitment of Contempt of the United States District Court for the Eastern District of Pennsylvania dated September 28, 1976 is not officially

reported and is printed as Appendix C herein. The Opinion of the United States District Court for the Eastern District of Pennsylvania denying Motion for Stay of Proceedings is not reported and is printed as Appendix D herein. The Findings and Memorandum Order of the United States District Court for the Eastern District of Pennsylvania dated November 10, 1976, is not reported and is printed as Appendix E herein. The opinion of the United States Court of Appeals for the Third Circuit is not yet officially reported and is printed as Appendix F herein. The Judgment of the United States Court of Appeals for the Third Circuit is not reported and is printed as Appendix G herein. The Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing is not reported and is printed as Appendix H herein.

JURISDICTION.

The Judgment of the United States Court of Appeals for the Third Circuit was entered on February 7, 1977 (Appendix G). The Petition for Rehearing was denied on March 14, 1977 (Appendix H). The Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

May an attorney be held guilty of criminal contempt where he states his reason for an objection or makes an offer of proof, in order to preserve his client's interests on appeal, contrary to instructions from the Trial Judge?

STATUTES INVOLVED.

The statutory provisions involved are 28 U. S. C. § 401 and Federal Rules of Criminal Procedure, Rule 42(a).

STATEMENT OF THE CASE.

The within Petition arises out of two separate instances wherein petitioner, Abraham E. Freedman, an attorney, was found guilty of criminal contempt because of his efforts to make an adequate offer of proof in order to preserve objections for appeal during the course of a lengthy trial in the United States District Court for the Eastern District of Pennsylvania. The trial involved commenced on January 15, 1976 and is still in progress.

At issue in the trial is the plaintiffs' contention that the defendants, including Local 542, International Union of Operating Engineers, represented by petitioner Freedman, discriminated against the plaintiff class on the basis of race and illegally denied them employment opportunities.

The first finding of contempt arose under the following circumstances. Plaintiffs had offered as a witness one Bennett O. Stalvey, a *government official*, who had worked with counsel for plaintiffs and gave an affidavit to the complaint in the preparation of the law suit. Mr. Stalvey, in his affidavit, alleged that the federal government had withheld over \$30,000,000.00 in federal funds for highway construction in the Spring of 1968 because of "questions concerning the availability of membership in and the referral practices of Local 542." In cross-examination of Mr. Stalvey, petitioner Freedman sought to introduce portions of Mr. Stalvey's pretrial deposition in which Mr. Stalvey admitted that he *could not say* whether such withholding of funds was because of any practices of Local 542, and in which Mr. Stalvey further admitted that he had had *no contact* with Local 542.

The portion of the pretrial depositions which petitioner sought to introduce ran over several pages, as Mr. Stalvey had been evasive in his answers and had to be

repeatedly pressed for specific answers to counsel's questions. During the course of introducing these pages from the pretrial deposition, counsel for plaintiffs objected to the reading of the transcript and the District Judge sustained the objection. Petitioner objected to this limitation on his right to cross-examine the witness and sought to state on the record the reason for his objection. The District Judge refused to permit petitioner to state his reason for the objection and threatened to hold him in criminal contempt if he did so. Petitioner then stated as follows:

"MR. FREEDMAN: I deem it my responsibility under the law when I make an objection to give the reason for the objection. I have done this all of my trial life, and I consider it not only my right to do it but my duty to do it.

As I said to Your Honor before, I meant no disrespect in any way, and representing my client's interests I have to do it to the best of my judgment.

I don't intend to be subservient, but I don't intend to be disrespectful and I haven't been disrespectful, and I am doing what the law requires me to do to state the reasons for my objections as I state the objections. If Your Honor doesn't want to hear it, then it is for the benefit of the appellate court."

The District Court continued in its refusal to permit Mr. Freedman to state the basis for his objection and, when Mr. Freedman insisted upon doing so, held him in criminal contempt and sentenced him to thirty days imprisonment.

The second incident occurred on November 9, 1976. Plaintiffs had called as a witness one Samuel F. Long, a black man and a member of the Union. Mr. Long testified concerning his attempts to join Local 542 and concerning

efforts he had made to obtain employment at the United States Steel Plant in Morrisville, Pennsylvania. The substance of Mr. Long's testimony was that he was denied employment at Morrisville because he was black, and that jobs which should have been available to him were given to white members of the Union.

In cross-examining Mr. Long, petitioner sought to introduce his work record which demonstrated that Mr. Long had received a steady flow of and an overabundance of work through the Union and had not been the victim of any discrimination, racial or otherwise. This effort to introduce the work record was objected to as being beyond the scope of direct examination. The District Judge sustained this objection and sought to limit the cross-examination solely to matters involving Mr. Long's attempt to obtain work at Morrisville and on another job in Delaware concerning which Mr. Long had also testified. Petitioner then sought to make an offer of proof to show that the work record would demonstrate that there had been no discrimination against Mr. Long and that he had received a vast number of jobs through the Union. When the Court denied petitioner the right to develop this material, petitioner responded that he had an obligation to make an offer of proof to protect the record for appellate review. Upon petitioner insisting on making this offer of proof, the District Court again held him in criminal contempt and fined him \$500.00.

Both the foregoing findings of contempt were appealed to the Third Circuit Court of Appeals which affirmed the decisions of the District Judge (Appendix F). The Court of Appeals held that *whether right or wrong*, the Order of the Trial Judge had to be obeyed *even if it meant that no reason for the objection or no offer of proof could be made*. It is from that ruling that this petition is filed.

REASONS FOR GRANTING THE WRIT.

The Decision Below Denies the Unqualified Right to Preserve an Objection on Appeal, Contrary to This Court's Decisions in *Maness v. Meyers*, 419 U. S. 449 and *Sacher, et al. v. United States*, 343 U. S. 1, Which Hold That the General Rule of Obedience to the Trial Judge's Ruling Does Not Come Into Play Until After Counsel Has Preserved His Point for Appeal.

Crucial to our adversary system of trial is the right of counsel to vigorously and effectively represent a client's position. *Offutt v. U. S.*, 348 U. S. 11, 13. In *Sacher, et al. v. United States*, 343 U. S. 1, after a trial of the Communist party leaders, their attorneys were held guilty of contempt and the sole question before this Court was whether the Trial Judge was authorized under the rules to impose punishment himself or whether the charges must be adjudged by another court. In reviewing the rights of counsel and upholding the right to present a "fearless, vigorous and effective performance", this Court first said, 343 U. S. at 13:

"But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever . . ."

Further, the Court said, with respect to the point at issue here, that the duty of obedience to the court's ruling is subject to counsel's right to preserve his point on appeal. Said the Court, 343 U. S. at 9:

"Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and un-

tenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—*his right is only respectfully to preserve his point for appeal . . .*" (Emphasis supplied)

This is precisely what petitioner was seeking to do here—respectfully preserve his point for appeal. The order of the Trial Judge denied him this most basic of rights, which counsel had the duty to assert in the protection of his client's interest notwithstanding the ruling of the Trial Judge.

To the same effect is the ruling of this Court in *Maness v. Meyers*, 419 U. S. 449, where an attorney was held in contempt for advising his client not to deliver certain papers pursuant to a subpoena. In considering the effect of a court's ruling, this Court said, 419 U. S. at 459:

". . . This does not mean, of course, that every ruling by a presiding judge must be accepted in silence. Counsel may object to a ruling. An objection alerts opposing counsel and the court to an issue so that the former may respond and the latter may be fully advised before ruling. *United States v. La Franca*, 282 U. S. 568, 570, 75 L. Ed. 551, 51 S. Ct. 278 (1931). But, once the court has ruled, counsel and others involved in the action must abide by the ruling and comply with the court's orders. *While claims of error may be preserved in whatever way the applicable rules provide*, counsel should neither engage the court in extended discussion once a ruling is made, nor advise a client not to comply . . ." (Emphasis supplied)

The Court held the attorney's right to be unqualified and fully effective in this connection, as it said, 419 U. S. at 466:

" . . . If performance of a lawyer's duty to advise a client that a privilege is available exposes a lawyer to the threat of contempt for giving honest advice it is hardly debatable that some advocates may lose their zeal for forthrightness and independence." (Emphasis supplied)

In the instant case, petitioner, in seeking to state the reason for his objection, was not disrespectful, loud or profane; he created no disorder in the courtroom, and he was acting in absolute good faith.

The good faith pursuit of a client's rights can never rise to the level of a criminal contempt. As this Court stated in *Maness v. Meyers*, *supra*, "wilfulness is an element of criminal contempt and must be proven beyond a reasonable doubt." For the purposes of criminal contempt " . . . wilfulness does not exist where there is a good faith pursuit of a plausible though mistaken alternative."

For this reason, also, it was error for the Court below to refuse to review the merits of the Trial Judge's order to determine whether there was good faith on petitioner's part.

The Court of Appeals below, in order to justify its decision, "assumed" that appellate courts would consider an objection where there was no offer of proof in the trial court if the reason for this was the Trial Judge's direction to counsel not to state the basis for his objection or not to make an offer of proof. This assumption is incorrect and unwarranted because the failure to adequately preserve objections for appeal results in the loss of rights on appeal, notwithstanding the Trial Judge's direction prohibiting the reasons for the objection or the offer of proof. This is

clearly illustrated not only in the decisions heretofore cited, but also in the very recent decision of *Morrissey et al. v. National Maritime Union, et al.*, 544 F. 2d 19 (2d Cir. 1976). There, a few days before the case was scheduled for trial, counsel for the primary defendant was advised that his client had to enter the hospital the same day that the trial was to begin for cancer surgery. Counsel immediately contacted the Trial Judge and requested an adjournment and offered to submit a medical affidavit. The Trial Judge replied that a medical affidavit was unnecessary as the adjournment would be denied in any event. The trial proceeded in the absence of the client, and the jury rendered a substantial verdict against the client. On appeal, the Second Circuit affirmed the denial of defendant's motion for a new trial on the ground that *counsel had failed to make an offer of proof as to what the client would have testified to had he been present at the trial*. Although counsel had been advised that the request for an adjournment would be denied regardless of what he might do, the Second Circuit held it was still necessary to make an offer of proof *to preserve the point for appeal*.

In the instant case, therefore, the right to preserve the point for appeal required the Trial Judge to afford petitioner the right to state his reason for the objection, in the one instance, and make the offer of proof in the second instance, where he was held in contempt.

In the *Matter of McConnell*, 370 U. S. 230 (1962), an attorney who had been stopped by the Trial Judge from pursuing a line of interrogation stated that he would continue to ask the questions until he was stopped by the bailiff. He made the statement because it was the only way he could properly preserve the Trial Judge's ruling for review on appeal. The attorney was held in criminal contempt. This Court stated, 370 U. S. at 232:

“ . . . This ruling placed Parmelee’s counsel in quite a dilemma because defense counsel was still insisting that all offers of proof be made in strict compliance with Rule 43(c) and *there was no way of knowing with certainty whether the Court of Appeals would treat the trial court’s order to dispense with questions before the jury as an excuse for failure to comply with the Rule*. Petitioner therefore not only sought to make clear to the court that he thought defense counsel’s objection was ‘right’ but also repeatedly insisted that he be allowed to make his offers of proof in compliance with the Rule . . . ” (Emphasis supplied)

The Court reversed the finding of contempt, holding that it was essential to justice “that lawyers be able to make honest, good faith efforts to present their clients’ cases” (370 U. S. at 236).

The issue here involved may and does appear in literally thousands of cases which are daily tried in the courts. Where, on the one hand, counsel has to run the risk of criminal contempt if he persists in efforts to make a proper record on appeal, and on the other, faces the danger of forfeiting his client’s rights on appeal if he does not, places counsel in a dilemma and cannot help but have a chilling effect on the ability of counsel to fulfill their responsibility to “fearlessly, vigorously and effectively” represent their clients.

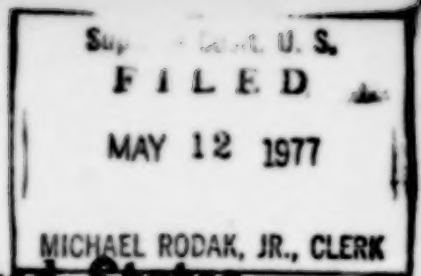
This Court should grant certiorari and reverse the decision below.

CONCLUSION.

For all the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review and reverse the decision below.

Respectfully submitted,

MARTIN J. VIGDERMAN,
CHARLES SOVEL,
FREEDMAN, LORRY, VIGDERMAN,
WEINER AND SOVEL,
Counsel for Petitioner.



IN THE
Supreme Court of the United States

October Term, 1976.

No. **76-1581**

ABRAHAM E. FREEDMAN,

Petitioner,

v.

**HONORABLE A. LEON HIGGINBOTHAM, JR., Judge of the
United States District Court for the Eastern District of
Pennsylvania,**

Respondent.

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

**MARTIN J. VIGDERMAN,
CHARLES SOVEL,
FREEDMAN, LORRY, VIGDERMAN,
WEINER AND SOVEL,
Lafayette Building, 8th Floor,
Philadelphia, Pa. 19106**

Counsel for Petitioner.

INDEX.

	Page
APPENDIX A—Statutory Provisions Involved	A1
APPENDIX B—Procedural Rule Involved	A2
APPENDIX C—Order, Findings, and Commitment of Contempt Dated September 28, 1976	A3
APPENDIX D—Opinion and Order of United States District Court for the Eastern District of Pennsylvania, Dated October 6, 1976	A5
APPENDIX E—Findings and Memorandum Order, and Order, Findings and Fine of Contempt, Dated November 10, 1976	A20
APPENDIX F—Opinion of the United States Court of Appeals for the Third Circuit	A27
APPENDIX G—Judgment of the United States Court of Appeals for the Third Circuit	A72
APPENDIX H—Order of the United States Court of Appeals for the Third Circuit, Denying Petition for Rehearing	A74

APPENDIX A.

18 U. S. C. § 401, Power of Court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

June 25, 1948, c. 645, 62 Stat. 701.

APPENDIX B.

**Federal Rules of Criminal Procedure
Rule 42.**

CRIMINAL CONTEMPT.

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and described it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

APPENDIX C.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-2698

COMMONWEALTH OF PENNSYLVANIA &
RAYMOND WILLIAMS, et al.

v.

LOCAL UNION 542, INTERNATIONAL UNION OF
OPERATING ENGINEERS, et al.

Order, Findings, and Commitment of Contempt.

On the afternoon of Tuesday, September 28, 1976, Abraham E. Freedman, Esquire, as counsel for one of the defendants in the above-captioned case was specifically advised to refrain from stating the basis of certain objections on the record. He was advised that if he continued to state the *basis* of the objections, when his objection had already been noted, that he would be held in contempt. He refused to refrain from stating the basis of his objection, but instead continued to state the basis of his objection despite my admonishment. I find that this deliberate conduct constituted contempt in the actual presence of the Court and was in violation of Rule 42 of the Federal Rules of Criminal Procedure. He is sentenced to thirty days. He is granted the right upon the entry of this judgment to be

on his own recognizance to challenge the validity of this order.

By THE COURT:

A. LEON HIGGINBOTHAM, JR., J.
Sept. 28, 1976

APPENDIX D.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-2698

COMMONWEALTH OF PENNSYLVANIA AND
RAYMOND WILLIAMS, et al.

v.

LOCAL UNION 542, INTERNATIONAL UNION OF
OPERATING ENGINEERS, et al., etc.

A. L. HIGGINBOTHAM, J.

October 6, 1976

Opinion.

On the afternoon of Tuesday, September 28, 1976, I found Abraham E. Freedman, Esquire, counsel for one of the defendants, guilty of criminal contempt committed in the actual presence of the court and thus in violation of Rule 42(a) of the Federal Rules of Criminal Procedure.

Though sentenced for thirty days he was granted the right "to be on his own recognizance to challenge the validity of this order". An appeal from the contempt sentence has been filed with the Court of Appeals for the Third Circuit, and now Local Union 542, for which Mr. Freedman is counsel, has filed a Motion for Stay of Proceedings of this civil action until such time as the Court of Appeals decides the validity of the criminal contempt

order and sentence. The Motions for Stay of Proceedings is DENIED.

Trial in this case started on January 19, 1976. It has been estimated that the trial will take an additional two to five months for completion.

The basis for Local 542's request for the stay is:

It would be detrimental to the rights and interests of Mr. Freedman's clients in this matter that he proceed with the instant trial while under the shadow of a criminal contempt Order and sentence. In the interest of justice, it is necessary that counsel and the Court in this matter have instructions from the Court of Appeals upon the issue of the right of counsel to state his position on the record, which was involved in the said contempt proceedings. (¶ 4)

To put the case in proper perspective, the relevant portions of the transcript must be read and are attached as Appendix A. Within brackets I have noted what in my opinion were at least ten warnings given to Mr. Freedman before he was held in contempt. The Order, Findings and Commitment of Contempt is attached as Appendix B.

I.

The record demonstrates clearly that Mr. Freedman persistently refused to comply with my ruling that he refrain from stating the reasons for his objections. He had been given full latitude to state his objections and furthermore had an automatic exception to my ruling. See F. R. C. P. 46.

The issue involved in the instant motion to stay is: will Mr. Freedman's clients be prejudiced simply because the case will proceed and he will be obligated to comply with the trial rulings of this court just as all of the other lawyers in this case are similarly obligated? His clients

will not be prejudiced if he is willing to comply with the rulings of this court. I have not expected in the past, and do not expect in the future, counsel to be subservient, docile, or even civil. I seek neither adulation or obsequiousness, but I will not abdicate from my judicial obligation to preside over the trial and make the prerequisite trial rulings. Trial judges in court, like umpires at home plate, cannot always be right, but rulings they must make. Thus to correct trial errors of substance, there is an orderly appellate process recognized by the judiciary since the memory of man runneth not to the contrary. At the conclusion of the trial, counsel has ample opportunity to file an appeal, challenge rulings—particularly where, as here, he has had an ample opportunity to note his objections. Further, even during the trial counsel has the opportunity to file for a Writ of Mandamus or of Prohibition. But trial counsel cannot be permitted to persistently and deliberately flout the rulings of the trial court, regardless as to how vehemently he may disagree with the ruling. Mr. Freedman is intimately familiar with the appellate process; for even in this case, during and before this trial, he has filed several appeals and petitions for Writ of Mandamus and Prohibition—all of which have been thus far denied.¹ Mr. Freedman's conduct was so egregious that

1. Commonwealth of Pa. v. Local 542, 347 F. Supp. 268 (E. D. Pa. 1972), *aff'd*, Docket No. 72-1901 (3d Cir. May 21, 1973); Commonwealth of Pa. v. Local 542, 388 F. Supp. 155 (E. D. Pa. 1974), Docket No. 74-2281 (3d Cir. Dec. 30, 1974) (denying petition for writ of mandamus); Order (3d Cir. Feb. 25, 1975) (denying petition for stay pending application for certiorari), *cert. denied* S. Ct. 74-1272 (June 9, 1975); Commonwealth of Pa. v. Local 542, Docket No. 74-1772 (3d Cir. July 27, 1975), (order denying petition for writ of mandamus and for writ of prohibition), *cert. den.* S. Ct. No. 74-1557 (July 27, 1975); Commonwealth of Pa. v. Local 542, Docket No. 76-1290 (3d Cir. March 10, 1976) (order denying motion for stay); Order, (3d Cir. March 12, 1976) (order denying writ of mandamus). Commonwealth of Pa. v. Local 542, Docket No. 76-1331 (3d Cir. March 17, 1976) (order denying supplemental petition for writ of mandamus and the supplemental petition for stay).

to tolerate it the judicial process would degenerate to whatever might be the personal whims of counsel on any particular day. To grant him the latitude he seeks, one might as well have counsel wear the robes, ascend the bench and then make irrevocable rulings while the trial judge patiently awaits the command of counsel. A court trial is not a process in anarchy to be engineered by trial counsel; rather it is an effort to try the case within the parameters of the historic role where there is always some semblance of order and rationality.

The judgment of criminal contempt was not made precipitously or lightly. I am well aware that the use of a criminal contempt citation is an extraordinary process which should be used with greatest reluctance, and always sparingly. It requires judicial reluctance so that one uses "the least possible power adequate to the end proposed." See generally, *Criminal Law Contempt in the Federal Courts*, 55 F. R. D. 102. Before the citation of contempt I cited *U. S. v. Profitt*, 498 F. 2d 1124 (3rd, 1974). For months during this protracted trial I have reflected on Judge Weiss's admonition that "The trial judge is called upon to apply an understanding of the defendant's viewpoint, make certain that his rights are not violated and strain the outer limits of patience." 498 F. 2d at 1129 (emphasis added) After ten warnings in one hour Mr. Freedman had strained the outer limits of my patience and I submit would have strained the outer limits of patience of my rational judicial official. Thus then it was appropriate to invoke the corollary which Judge Weiss also suggested in *Profitt*: "Nonetheless, the judge must be firm as well as fair, because otherwise he is derelict in his duty to properly administer the laws". 498 F. 2d 1129.²

2. In a somewhat different context, but nevertheless recognizing that trial judges need not float like a cork on a bubbling sea without any capacity to guide the course of litigation, the U. S.

II.

In less than one hour he was given *ten* chances to start acting like a responsible lawyer rather than an unrestrained protagonist. A week later, on October 5, 1976, he stated:

I regret the incident on Tuesday. But I must say, Your Honor, that I was correct on my position. If you make an objection, you must, under the law, give the reason for it. If you don't give the reason for it, you waive it. This has been so held by the Supreme Court of the United States and lesser Courts of Appeal.

I must say that I make this statement without any requests or inducement of concession or favor.

From his comments I still do not know whether he regretted my findings or regretted his conduct. If he does not regret his conduct *and* plans to pursue that same lack of decorum he will have no immunity from any further judicial responses which will always be commensurate to the magnitude of the infraction. However, if he refrains from the type of conduct which he displayed on September 28, 1976, neither he nor his clients will have any problems in the orderly litigation of this case. I will not act in a punitive or vindictive fashion to any party or to any counsel. While I am not interested in Mr. Freedman serving any significant time of incarceration, I expect for him to act like a responsible lawyer. All of the parties here are entitled to a reasonably expeditious trial and that trial

2. (Cont'd.)

Supreme Court recently said, "But here as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in *appropriate cases*." *Nat. Hockey League v. Metro. Hockey Club*, 49 L. Ed. 2d 747, 751 (1976) (emphasis added) Similarly, the contempt citation here was one of the appropriate cases for such severe judicial action.

should not be delayed any further so that the very counsel who so flagrantly flouted the ruling of the court can further postpone the case.

In *Cox v. State of New Hampshire*, a unanimous Supreme Court stated "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." 321 U. S. 569, 574 (1941). Similarly, the existence of a court for the adjudication of disputes must be predicated upon some organized system of public order within it.

By this ruling, I am not attempting to restrain one's rational zeal to any cause which he believes is right and just. Lawyers are not precluded from vigorously defending their clients' cause. Less than a decade ago, petitioners, who were holding peaceful protests against racial discrimination in Birmingham, Alabama, were advised by the United States Supreme Court that the rule of law "... reflects a belief that in the fair administration of justice *no man can be judge in his own case*, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion." *Walker v. City of Birmingham*, 388 U. S. at 320, 321 (emphasis added). Similarly, Mr. Freedman cannot be the judge in his own clients' case, however senior his years or station at the bar and however righteous he might believe his clients cause has been.

Motion for Stay DENIED.

By THE COURT:

A. LEON HIGGINBOTHAM, JR., J.

APPENDIX A

Transcript, pp. 5220-5229

The "warnings" noted within brackets have been added.

THE COURT: I thought you were going to read a couple more questions. Apparently you are not. I will make my ruling on the basis of Mr. Goodman's objection. I will sustain the objection of a random reading of notes of testimony on the deposition. If you ask the Witness a question, and then if you follow up that question, with a specific reference in the transcript to which you claim there is a contradiction, I will permit it. But it is impossible to focus on a multi-phase series of questions in terms of cross-examination.

MR. FREEDMAN: I object to Your Honor's characterization as of my reading a deposition as random.

THE COURT: I made my ruling.

MR. FREEDMAN: I am making my objection to Your Honor's ruling, and I am going to state the reason for my objection. I don't think that Your Honor can stop me from doing that.

[First Warning] THE COURT: I am directing you not to state the basis of your objection. Whatever you have, as a matter of law, as a basis of your objection, you will be the beneficiary of. Now, we will just deter what I think is a irrational cross-examination process. So I have made my ruling.

MR. FREEDMAN: I am afraid I have to give the basis for my objection.

[Second Warning] THE COURT: All right. You may disregard my direction. If you give the basis when I told

you not to, I am going to send for the marshal and hold you in contempt.

MR. FREEDMAN: You can send for the marshal right now, because I am going to give the basis for my objection.

[Third Warning] THE COURT: I am directing you, as an officer of this Court to not state the basis of your objection. Whatever basis you have, you will have the benefit of claiming it. And if you disregard that, I am going to hold you in contempt.

MR. FREEDMAN: What I have to say, I want to say, not only for Your Honor, but for the Appellate Court if there happens to be a review. I am going to state it.

[Fourth Warning] THE COURT: Just wait a minute. We will take a five-minute recess. I will send for the marshal.

(Brief recess.)

[Fifth Warning] THE COURT: The record will speak for itself.

I have advised Mr. Freedman to not state on the record any further the basis for his objection.

I have advised him—

MR. FREEDMAN: I didn't state any basis for my objection yet.

THE COURT: Mr. Freedman, please permit me to finish. When I am ready to hear from you, I will let you know, and when I am finished I will let you know.

[Sixth Warning] I have advised him to not state as he insisted he would, contrary to my instructions, the basis for his objection to certain rulings I have made. I consider his insistence that he would state the basis, though I have advised him not to, to be a wilful, deliberate act done not isolated in the heat of trial but rather a deliberate, continuous and repeated act which is in violation of the

rule issued by this Court and which constitutes the basis of a criminal contempt violation under Rule 42, conduct which takes place in the presence of the judge over which a summary disposition would be appropriate.

I have sent for the Marshals. In 13 years I have never had to hold a lawyer in contempt, and I don't welcome that.

I do not believe that a rule of the Court can be flouted. The issue is whether I am the judge, and the Court will conduct the proceedings or whether it will be done at Mr. Freedman's whim.

[Seventh Warning] Now, I am giving him the last opportunity. I am directing him to not state on the basis of this record his reasons for his objections on the ruling I have made, and it is up to him.

MR. FREEDMAN: Is Your Honor permitting me to speak now?

THE COURT: I am permitting you to speak, and I have told you what my position is.

MR. FREEDMAN: I deem it my responsibility under the law when I make an objection to give the reason for the objection. I have done this all of my trial life, and I consider it not only my right to do it but my duty to do it.

As I said to Your Honor before, I meant no disrespect in any way, and representing my client's interests I have to do it to the best of my judgment.

I don't intend to be subservient, but I don't intend to be disrespectful and I haven't been disrespectful, and I am doing what the law requires me to do to state the reasons for my objections as I state the objections. If Your Honor doesn't want to hear it, then it is for the benefit of the appellate court.

[*Eighth Warning*] THE COURT: I have told you, Mr. Freedman, that on the issue which we have just discussed that I don't want to hear the reasons for your objections, and I am directing you to proceed to your next question.

[*Ninth Warning*] Now, if you want to state the reasons for your objections, I will consider that to be a violation of my order, a violation of Rule 42, and criminal contempt.

MR. FREEDMAN: Well, as I understand the law and as I understand my legal responsibilities, I must state the reason for my objection in addition to my objection. I think the appellate court has stated—

THE COURT: Mr. Freedman—

MR. FREEDMAN: You said you would give me an opportunity to be heard, Your Honor.

[*Tenth Warning*] THE COURT: So it is clear, Mr. Freedman, I am directing you to proceed to your next question and not to state your reasons for objecting to my last ruling. Now it is your choice.

MR. FREEDMAN: I must state the reasons for my objection, and they are as follows:

This witness has not only contradicted himself but it is an absolute conflict between what he said on the stand here and what he said in his deposition, and that is the reason for my objection. I will read to you the part that I think is an absolute conflict.

To repeat some of the questions at the bottom of page 60:

"Q. Who made that determination?

"A. Which determination?

"Q. That money should be withheld?

"A. The Federal Government.

"Q. Was it because of Local 542's activity?

"A. I can't say that."

That is a direct conflict of what he said from the stand here, and that is my reason.

THE COURT: All right. I consider this to be a wilful violation of my ruling.

I have taken into full consideration the cases in this circuit such as *United States of America vs. Profitt*, 498 F. 2d, 1124; *United States vs. Schiffer*, 351 Fed. 2d, 91, and the whole series of cases which are discussed here.

I think this is wilful, deliberate misconduct in court, a wilful, deliberate refusal to comply with an order of the Court.

I find that Abraham Freedman is guilty of criminal contempt, and I sentence him to 30 days. I will give him an opportunity, if he desires, to file an appeal on that. Otherwise the Marshals can commit him.

Mr. Freedman, you can do whatever you wish.

MR. FREEDMAN: I have already done it.

THE COURT: I will give you the right to challenge my sentence. I will give you the right to appeal. I think it is a wilful violation, and it is in contempt.

MR. FREEDMAN: Well, I disagree with Your Honor on the law, and I disagree with the other statements that Your Honor made that I was in continuing contempt. I have not been in contempt of this Court at any time.

THE COURT: I find Mr. Freedman in contempt, and I sentence him to 30 days. I will permit him to challenge this in any way he wishes, and if he requests I would not hold him in the custody of the Marshal until he has pursued whatever remedies he desires to pursue in this case. Other-

wise, if he doesn't request that, he will be committed forthwith.

MR. FREEDMAN: If I don't request what?

THE COURT: If you are requesting to not be put into the custody of the Marshal I will not put you in the custody of the Marshal as a matter of courtesy, but not as a matter of right.

MR. FREEDMAN: I certainly don't want to be put in the custody of the Marshal or anyone. I don't want to be put under any restraint. I am not withdrawing from anything I said. I think I am right.

THE COURT: Mr. Freedman, you have the choice to take an appeal from my ruling—

MR. FREEDMAN: That's what I will do.

THE COURT: Do you want to go into custody or wait until judgment is entered?

MR. FREEDMAN: Or wait until what?

THE COURT: Wait until judgment is entered. One will be entered in about ten minutes.

MR. FREEDMAN: That's up to Your Honor.

THE COURT: All right. You will go into custody of the Marshal.

—
(Recessed at 2:37 P. M.)
—

(In court, 3:17 P. M.)

(Also Present: Charles Sovel, Esq. for Abraham E. Freedman, Esq.)

THE COURT: Mr. Freedman, would you come to the bar of the court, please.

(Mr. Freedman at bar.)

THE COURT: In accordance with Rule 42 I have made my prerequisite findings, order and commitment of contempt which I sign and give to the Clerk and which I will ask the Clerk to file forthwith and make copies available to Mr. Freedman and the other parties in this case. There is no need for me to read it. It speaks for itself.

Mr. Freedman, I am, under this order, granting you the right to be on your own recognizance to challenge the validity of this order and you may proceed in every way you wish.

This case will be recessed until Tuesday morning.

MR. FREEDMAN: You mean I am released pending appeal?

THE COURT: You are on your own recognizance to challenge the validity of this order and—

MR. SOVEL: Your Honor—

THE COURT: I am sorry. Yes, sir.

MR. SOVEL: If Your Honor please, my name is Charles Sovel. I am here with Mr. Freedman.

MR. FREEDMAN: He is my partner.

THE COURT: I remember Mr. Sovel quite well.

MR. SOVEL: I haven't had—

THE COURT: Of course you haven't. No one had an opportunity to see it. If you have any questions or Mr. Freedman has any questions on this order I will be in chambers and I will be pleased to talk to you or to talk to you and Mr. Freedman, but he is on his own recognizance.

In 13 years I never held a lawyer in contempt. I regret deeply that I was presented with an option for which there was no rational alternative in my view.

So that the order has been signed. He is on his own recognizance.

The order will be entered of record forthwith, and you will get copies.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—
CIVIL ACTION No. 71-2698
—

COMMONWEALTH OF PENNSYLVANIA
AND
RAYMOND WILLIAMS, et al.

v.

LOCAL UNION 542, INTERNATIONAL UNION OF
OPERATING ENGINEERS, et al., etc.

—
Order.

AND Now, this 5th day of October, 1976, the Motion
for Stay of Proceedings is DENIED.

By THE COURT:

A. LEON HIGGINBOTHAM, JR., J.

APPENDIX E.

—
IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
—

CIVIL ACTION NO. 71-2698
—

COMMONWEALTH OF PENNSYLVANIA
AND
RAYMOND WILLIAMS, et al.

v.

LOCAL UNION 542, INTERNATIONAL UNION OF
OPERATING ENGINEERS, et al., etc.

—
A. L. HIGGINBOTHAM, J.

November 10, 1976

Findings and Memorandum Order.

Five weeks ago, during the afternoon of Tuesday, September 28, 1976, I found Abraham E. Freedman, Esquire, guilty of a criminal contempt committed in the actual presence of the court, and pursuant to Rule 42(a) of the Federal Rules of Civil Procedure he was sentenced to thirty (30) days. The service of the sentence was deferred. He was placed on his own recognizance to challenge the validity of that order. The matter is now before the Court of Appeals for the Third Circuit and it is due for argument in December of 1976. The notes of testimony of September 28, 1976, and my opinion of October 6, 1976 related to the contempt finding are hereby incorporated as

an analysis of what I deem to be the relevant law pertaining to the Federal Rules of Criminal Procedure.

I had hoped fervently that the previous contempt finding and sentence would cause Mr. Freedman to thereafter proceed within the confines of professional conduct required of counsel. Unfortunately, Mr. Freedman's conduct has again reached the level of such defiant and contumacious refusal to comply with the trial rulings of the Court that it is regrettably necessary to determine whether he is again guilty of criminal contempt in violation of Rule 42(a) of the Federal Rules of Criminal Procedure.

To put the instant factual issue in context, on the morning of November 9, 1976 the plaintiffs put on the stand Samuel Franklin Long as a witness for direct examination. In substance he was questioned about his work experience as to the equipment which he had operated and as to his visit to a site where persons were being trained to use land moving equipment.

The instant problem pertains to whether Mr. Freedman willfully defied my ruling as to the scope of cross-examination which I would permit of Mr. Long. To put the matter in its factual context, Mr. Freedman had marked as Document U-186 the work record of Samuel Franklin Long as kept by the Union. It pertained to events which took place subsequent to April, 1965 and thus subsequent to the two specific job situations at Morrisville and Delaware about which Mr. Long had testified. The work record of an operating engineer is substantially different than the normal work record of an industrial employee. As an example, Mr. Long's work record on U-186 has 112 separately dated entries which make specific reference to separate jobs on which he worked. Since plaintiff had not made reference to work record U-186, I ruled that reference to that document was not permissible on cross-examination. When Mr. Freedman attempted to use this

work record as to events subsequent to 1965, plaintiff's counsel, Mr. Reinstein, noted:

"Objection, Your Honor. Mr. Long's work history in this work record is beyond the scope of direct."

My ruling was:

"THE COURT: I will sustain objections about his work record on matters other than the Morrisville and Delaware jobs, which are the only things he was questioned about on direct examination." [N. T. 65, 7]

"THE COURT: Mr. Freedman, just so that you will understand the nature of my ruling, anything which is in U-186, if you question the witness about those transactions unless they pertain to the only two jobs of which this witness has testified, I will sustain an objection thereto. And you have an exception.

So it is not necessary for you to read through these several pages." [N. T. 6518]

My purpose in limiting the form of cross-examination was obvious. At this point, ten months after the trial began, I did not want the transcript to be unduly lengthened with the reading to the court stenographer of a whole series of notations which I had precluded from cross-examination. Since the document was already marked it was part of the trial record for me or an appellate court to review. Attempting to further protract this case, Mr. Freedman proceeded to say what his offer of proof was. From my experience with him in the past where extended offers of proof were made and statements from documents which have already been marked as a part of the record have been read in for pages and pages of testimony, I did not want this trial to be further unnecessarily protracted. I advised him that he could proffer anything in U-186, either

the entire statement or selected portions, and that he should note the dates of the transactions as given on U-186 and then "the record will speak for itself." (6520) I directed him to give merely the dates of the entries, since obviously a reference to the dates would reveal the issue or factual statement for the proffer of proof which Mr. Freedman claims he wanted to make. He was warned five times to not continue reading into the record matters beyond the date of the entry. On the sixth occasion I said:

"THE COURT: Mr. Freedman, I am giving you the opportunity to make your offer of proof; and your offer of proof is that you would read into the record certain specific entries which I noted on certain days. That is all I have to have, and automatically that is incorporated in the record.

But what I don't want, Mr. Freedman, is to just have a whole series of entries read into the record because I have already ruled that they are precluded because they are not within the scope of the direct.

So I am trying to accommodate you and give you maximum latitude by getting you to note the dates.

And as I have said before, my ruling applies to all of the entries here."

He continued to flout my order, even after the eighth warning, by claiming "I've got to tell the Court of Appeals of what my offer of proof is, because neither Your Honor or the Appellate Court will know what it means when you read it" (referring to the docket entries). (6525) I am confident the judges of the Court of Appeals are endowed by their creator with the capacity to read the English language and to understand it. We need not take hours of testimony while Mr. Freedman reads entries which are *already* a part of the record. I gave him fifteen opportunities to give the record entries by merely noting the

alleged date of the entry which he wanted to use on the work record, so that we could therefore proceed. For fifteen times he *willfully, purposely*, and in a most deliberate fashion refused to follow my order as to what should be done in his alleged proffer of proof but continued to proceed in his own fashion. More than an hour of time was taken spanning many pages of testimony and in deliberate defiance of my trial ruling.

If Mr. Freedman's defiant conduct is to be tolerated or sanctioned, this trial will never end. The doctrines I stated in my October 6, 1976 Memorandum are equally applicable to the events of November 9, 1976:

"Mr. Freedman's conduct was so egregious that to tolerate it the judicial process would degenerate to whatever might be the personal whims of counsel on any particular day. To grant him the latitude he seeks, one might as well have counsel wear the robes, ascend the bench and then make irrevocable rulings while the trial judge patiently awaits the command of counsel. A court trial is not a process in anarchy to be engineered by trial counsel; rather it is an effort to try the case within the parameters of the historic role where there is always some semblance of order and rationality."

Mr. Freedman's persistent defiance must be put in the context of an already protracted trial which could be extended unlimitedly if counsel is granted the latitude to go on endlessly reading into the record those matters which have *already* been precluded *and* which are already a matter of record. In such a context Mr. Freedman could have extended for three or four hours the "cross-examination" of Mr. Long on matters which had already been precluded.

The conduct of Mr. Freedman has been so contumacious and in such willful defiance of precise court rulings that it is difficult to conceive of such actions emanating from any rational person who has been trained in the law. Thus, the only explanation for such conduct is that Mr. Freedman is deliberately pursuing a course whereby he desires to use contumacious and contemptuous conduct as a basis to delay completion of this trial by reason of this Court having to impose criminal sanction commensurate with the magnitude of his breach of professional conduct. Though I find that his conduct was deliberate, willful, and constitutes a contempt in the actual presence of the court and in violation of Rule 42(a) of the Federal Rules of Criminal Procedure, in this instance I refuse to impose the type of sanction which would be permissible, an additional criminal sentence, because it would further delay this trial. I therefore am imposing on Mr. Freedman a fine in the amount of five hundred dollars (\$500.00). It is imposed with the full awareness that the fine should bear some reasonable relation to the nature and gravity of the contumacious conduct. [U. S. v. Conole, 365 F. 2d, 306, 308 (3d Cir. 1966)].

By THE COURT:

A. LEON HIGGINBOTHAM, JR., J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-2698

COMMONWEALTH OF PENNSYLVANIA &
RAYMOND WILLIAMS, et al.

v.

LOCAL UNION, 542, INTERNATIONAL UNION OF
OPERATING ENGINEERS, et al.

Order, Findings, and Fine of Contempt.

On the afternoon of Tuesday, November 9, 1976, Abraham E. Freedman, Esquire, as counsel for one of the defendants in the above-captioned case, deliberately violated the rulings of the Court as noted in the attached Memorandum and at pp. 6518 to 6532 of the Notes of Testimony. Such deliberate and willful conduct constituted contempt in the actual presence of the Court and was in violation of Rule 42(a) of the Federal Rules of Criminal Procedure. He is fined five hundred dollars (\$500.00) and required to pay to fine to the Clerk within seven days.

By THE COURT:

A. LEON HIGGINBOTHAM, JR., J.

APPENDIX F.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-2266 and 76-2470

COMMONWEALTH OF PENNSYLVANIA
and

RAYMOND WILLIAMS, WILLIE McKAY, MARION J.
EADDY, RANDOLPH HUGHES, JR., AREL BROWN-
LEE, WILLIAM BOSTIC, KENNETH HOWARD,
ALPHA CHRISTMAS, RONALD RICHARDSON,
CLARENCE WINDER, RONALD CRAWFORD and
FRANK GILCHRIST, on their own behalf and on be-
half of all others similarly situated

v.

LOCAL UNION 542, INTERNATIONAL UNION OF
OPERATING ENGINEERS; OPERATING ENGI-
NEERS JOINT APPRENTICESHIP AND TRAINING
COMMITTEE OF PHILADELPHIA, EASTERN
PENNSYLVANIA, and the STATE OF DELAWARE;
and

GENERAL BUILDING CONTRACTORS ASSOCIA-
TION, INC., CONTRACTORS ASSOCIATION OF
EASTERN PENNSYLVANIA, UNITED CONTRAC-
TORS ASSOCIATION, and PENNSYLVANIA EX-
CAVATING CONTRACTORS ASSOCIATION, on their
own behalf and on behalf of all others similarly situated
and

GLASGOW, INC., on its own behalf and on behalf of all
others similarly situated,

ABRAHAM E. FREEDMAN, ESQUIRE,
Appellant

APPEAL FROM JUDGMENT OF SENTENCE FOR CRIMINAL CONTEMPT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA AS OF CIVIL ACTION NO. 71-2698

Argued December 2, 1976

Before ROSENN, FORMAN, and GARTH, *Circuit Judges*

MARTIN J. VIGDERMAN, ESQUIRE
CHARLES SOVEL, ESQUIRE
Freedman, Lorry, Vigderman, Weiner
and Sovel
Lafayette Building, 8th Floor
Philadelphia, Pa. 19106
Attorneys for Appellant

DAVID W. MARSTON
United States Attorney
WALTER S. BATTY, JR.
Assistant United States Attorney
Chief, Appellate Section
BONNIE BRIGANCE LEADBETTER
Assistant United States Attorney
3310 United States Courthouse
Philadelphia, Pa. 19106
Attorneys for Appellee

Opinion of the Court

(Filed February 7, 1977)

ROSENN, *Circuit Judge*

These criminal contempt cases against an attorney require us to consider the sensitive distinctions between

zealous representation of a client's interests and contumacious interference with the orderly progress of trial court proceedings.¹ With full appreciation of the contentious role of trial counsel,² yet with due regard for the essential power of the trial court to function effectively,³ we conclude that the courtroom conduct of the attorney in these cases far exceeded the limits of proper advocacy, and we affirm the orders of criminal contempt entered against him.

I.

Abraham E. Freedman appeals from two orders of criminal contempt entered against him in the course of a continuing trial in the United States District Court for the Eastern District of Pennsylvania.⁴ Both were summary citations imposed under Rule 42(a) of the Federal Rules of Criminal Procedure,⁵ and the incidents giving rise to

1. See *Offutt v. United States*, 348 U. S. 11, 13 (1954); *Sacher v. United States*, 343 U. S. 1, 13-14 (1952); R. Goldfarb, *The Contempt Power* 191-92 (1963).

2. *United States ex rel. Robson v. Oliver*, 470 F. 2d 10, 12 (7th Cir. 1972); *In re Dellinger*, 461 F. 2d 389, 397 (7th Cir. 1972). See *In re McConnell*, 370 U. S. 230, 237 (1962) (Harlan, J., dissenting).

3. *United States v. Proffitt*, 498 F. 2d 1124, 1129 (3d Cir.), cert. denied, 419 U. S. 1002 (1974). See *United States v. Wilson*, 421 U. S. 309, 319 (1975).

4. After the first contempt order was imposed, Freedman moved this court to stay the proceedings in the district court until the disposition of the appeal from that order. This court denied the motion by order dated October 8, 1976.

5. Rule 42(a) provides:

Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Rule 42 applies the contempt power defined in 18 U. S. C. § 401 (1970). That statute provides that a federal court has the power

both orders were sufficiently similar for us to have the cases consolidated for expedited appeal. Because the issues raised in the two cases are not completely identical, however, we shall deal with each order separately.⁶

The incident underlying the first contempt order (No. 76-2266) occurred on September 28, 1976, the fifty-first day of a non-jury trial on a civil rights class action brought by the Commonwealth of Pennsylvania and certain named individuals against, *inter alia*, the local union represented by appellant Freedman. The complaint alleges that the defendants discriminate against minority group members "in the recruitment, apprenticeship, membership, training, upgrading, referral, and representation of men who work within the operating engineers['] craft"

Plaintiffs offered as a witness one Bennett O. Stalvey, Jr., who, as Area Coordinator and Regional Director of the Philadelphia Regional Office of the Office of Federal Contract Compliance, had executed an affidavit that was appended to the plaintiffs' complaint. Stalvey had stated in his affidavit that "serious questions concerning the availability of membership in, and the referral practices of, Local 542 led to the withholding of over 30 million dollars (\$30,000,000) in Federal funds from State highway construction from the spring of 1968 until the summer of that year" In cross-examining Stalvey, Attorney Freedman sought to introduce portions of a pretrial deposition in which Stalvey had stated, allegedly in contradiction of

5. (Cont'd.)

to punish by fine or imprisonment such contempt of its authority as "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." See *United States v. Wilson*, 421 U. S. 309, 315 n. 6 (1975); *United States v. Sacher*, 343 U. S. 1, 6-7 (1952).

6. These orders are appealable under 28 U. S. C. § 1291 (1970). See *International Business Machines Corp. v. United States*, 493 F. 2d 112, 114 (2d Cir. 1973), *cert. denied*, 416 U. S. 976 (1974).

the affidavit, that he could not say that the funds had been withheld "because of Local 542's activity," but could say only that the union's activity had "led to" the withholding of funds. Freedman's method of cross-examining Stalvey about the alleged discrepancy consisted of the lawyer's reading an extensive portion of the affidavit verbatim to the witness.

After Mr. Freedman had quoted sixteen questions and sixteen answers from the deposition, opposing counsel objected that no inconsistency had been shown, and moved that "any reading exercises be stopped." The trial judge asked Freedman if he had anything specific to call to the witness's attention, and inquired how many more questions and answers Freedman intended to read from the deposition. "A couple more," Freedman responded. "Just to go over a couple more questions and answers," the judge said. "Then we will focus it. If we are talking about several questions being read, I am just going to ask you to show them to the witness, and we will identify them by pages."

Freedman proceeded to quote five more questions and answers. The judge then interrupted and addressed Freedman as follows:

I thought you were going to read a couple more questions. Apparently you are not. I will make my ruling on the basis of Mr. Goodman's [opposing counsel's] objection. I will sustain the objection of a random reading of notes of testimony on the deposition. If you ask the witness a question, and then if you follow up that question, with a specific reference in the transcript to which you claim there is a contradiction, I will permit it. But it is impossible to focus on a multi-phase series of questions in terms of cross-examination.

The following colloquy ensued:

MR. FREEDMAN: I object to Your Honor's characterization of my reading a deposition as random.

THE COURT: I made my ruling.

MR. FREEDMAN: I am making my objection to Your Honor's ruling, and I am going to state the reason for my objection. I don't think that Your Honor can stop me from doing that.

THE COURT: I am directing you not to state the basis of your objection. Whatever you have, as a matter of law, as a basis of your objection, you will be the beneficiary of. Now, we will just deter what I think is [an] irrational cross-examination process. So I have made my ruling.

MR. FREEDMAN: I am afraid I have to give the basis for my objection.

THE COURT: All right. You may disregard my direction. If you give the basis when I told you not to, I am going to send for the marshal and hold you in contempt.

MR. FREEDMAN: You can send for the marshal right now, because I am going to give the basis for my objection.

THE COURT: I am directing you, as an officer of this Court not to state the basis of your objection. Whatever basis you have, you will have the benefit of claiming it. And if you disregard that, I am going to hold you in contempt.

MR. FREEDMAN: What I have to say, I want to say, not only for Your Honor, but for the Appellate Court if there happens to be a review. I am going to state it.

THE COURT: Just wait a minute. We will take a five-minute recess. I will send for the marshal.

Following a brief recess, the judge warned Freedman twice more not to state the reason for the objection, and admonished him that he would consider a violation of his order to be criminal contempt. Freedman replied that he considered it his "responsibility under the law" to state the basis of his objection. After two more direct orders not to state the reason for his objection, and two more warnings that a violation of those orders would be considered criminal contempt, Freedman nevertheless proceeded to state the basis of his objection. He had been ordered a total of seven times not to do so; he had been specifically warned four times that if he disregarded the judge's ruling he would be held in criminal contempt.⁷ The trial judge thereupon held Freedman in contempt, and sentenced him to thirty days in prison.⁸

7. The transcript of the proceedings following the recess is reproduced as Appendix A to this opinion.

8. The district court's Order, Findings, and Commitment of Contempt, entered 40 minutes after the incident described above, reads as follows:

On the afternoon of Tuesday, September 28, 1976, Abraham E. Freedman, Esquire, as counsel for one of the defendants in the above-captioned case was specifically advised to refrain from stating the basis of certain objections on the record. He was advised that if he continued to state the *basis* of the objections, when his objection had already been noted, that he would be held in contempt. He refused to refrain from stating the basis of his objection, but instead continued to state the basis of his objection despite my admonishment. I find that this deliberate conduct constituted contempt in the actual presence of the Court and was in violation of Rule 42 of the Federal Rules of Criminal Procedure. He is sentenced to thirty days. He is granted the right upon the entry of this judgment to be on his own recognizance to challenge the validity of this order.

BY THE COURT:

/s/ A. Leon Higginbotham, Jr.

Sept. 28, 1976 3:17 P. M. J.

On appeal from this contempt order, Freedman urges that his conduct was necessary to protect the record. He contends that he acted in the good faith belief that his action was proper and therefore lacked any criminal intent, and that his conduct did not constitute an actual obstruction of justice.

II.

Our analysis of the issues must commence with a recognition of the historic role of the bench and bar in our jurisprudential system. The American legal system contemplates both an independent, respected judiciary and an independent, vigorous bar. The system takes account of the basic need for the orderly administration of justice. Without order in a courtroom, justice may be empty and evanescent. A balance must be maintained, however, between the necessity for judicial power to curb obstruction of justice in the courtroom and the need for lawyers to present their clients' cases fairly, fearlessly, and strenuously. In preserving the balance, a court must not exercise its summary power of contempt to stifle courageous and zealous advocacy and thereby impair the independ-

S. (Cont'd.)

Appellant does not contend that this order fails to meet the strict requirements of Fed. R. Crim. P. 42(a), note 5 *supra*. See *United States v. Schrimsher*, 493 F. 2d 842, 844-45 (5th Cir. 1974). Although the district judge did not refer specifically to the pages of the trial transcript at which the incident occurred, his description of the event in question is sufficiently detailed to permit us to locate the relevant transcript pages. Accordingly, we have not limited our consideration to the facts as described in the order, but have looked to the transcript itself, which is a part of the record on appeal. See *In re Williams*, 509 F. 2d 949, 952, 959 (2d Cir. 1975).

The district judge did not file an opinion with this order. He did file an opinion with his order denying Freedman's motion to stay the proceedings pending this appeal; that opinion describes the incident underlying the contempt order in considerably more detail than the contempt order itself. We do not and need not rely on the opinion in our consideration of the contempt order.

ence of the bar. On the other hand, the dignity, the independence, and the control of the court must not be degraded by lawyers who "equate contempt with courage [T]he processes of orderly trial, which [are] the supreme object of the lawyer's calling," must be protected. *Sacher v. United States*, 343 U. S. 1, 14 (1952).

A.

The appellant argues that the district judge erred in restricting the method of cross-examining witness Stalvey. In order to ensure the availability of appellate review of the judge's ruling, Freedman insists, he had to state the reasons for his exception to that ruling; otherwise the court of appeals might decline to consider a challenge to the assertedly erroneous limitation of cross-examination. In essence, Freedman submits that an attorney is free to violate a direct order of a trial judge if the lawyer believes that the protection of his client's interests on appeal requires such action. The appellant relies most heavily on two cases to support his position: *In re McConnell*, 370 U. S. 230 (1962), and *Morrissey v. National Maritime Union*, 544 F. 2d 19 (2d Cir. 1976).

In re McConnell, *supra*, concerned a lawyer who was summarily found guilty of criminal contempt for in-court statements made while representing the plaintiff in an anti-trust suit. Plaintiff's counsel, forbidden by the trial judge from proving their conspiracy charge against the defendants, asked counsel for the defendants to stipulate that the plaintiff would have introduced certain evidence of conspiracy had it been allowed to do so. Defense counsel refused to stipulate, however, and instead insisted that plaintiff's counsel prepare their record by following the procedure set out in Rule 43(c) of the Federal Rules of Civil Procedure, which requires that before an offer of

proof is made questions upon which the offer is based must first be asked in the presence of the jury. The Supreme Court gave this description of what ensued:

Unwilling to risk dismissal of their appeal for failure to follow Rule 43(c), [McConnell] proceeded to produce and question witnesses in the presence of the jury in order to lay the proper foundation for their offers of proof of conspiracy. But during the process of this questioning the judge ordered it stopped and directed that any further offers of proof be made without first having asked questions of witnesses in the presence of the jury. This ruling placed [McConnell] in quite a dilemma because defense counsel was still insisting that all offers of proof be made in strict compliance with Rule 43(c) and there was no way of knowing with certainty whether the Court of Appeals would treat the trial court's order to dispense with questions before the jury as an excuse for failure to comply with the Rule. Petitioner therefore not only sought to make clear to the court that he thought defense counsel's objection was "right" but also repeatedly insisted that he be allowed to make his offers of proof in compliance with the Rule.

370 U. S. at 232 (footnotes omitted). McConnell advised the trial judge that "we have a right to ask the questions, and we propose to do so unless some bailiff stops us." *Id.* at 235. Following a short recess requested by his co-counsel, McConnell refrained from asking questions that the judge had forbidden; in fact, he did not ask any more such questions during the course of the trial.

The trial judge summarily found McConnell guilty of criminal contempt for insisting that he be allowed to make offers of proof in compliance with Rule 43(c), and for threatening to violate the judge's order that he refrain

from making his offer of proof by questioning witnesses in the presence of the jury. The court of appeals affirmed. The Supreme Court, in an opinion by Mr. Justice Black, reversed, holding that "a mere statement by a lawyer of his intention to press his legal contention until the court has a bailiff stop him [cannot] amount to an obstruction of justice that can be punished under the limited powers of summary contempt" *Id.* at 236. "[T]he bailiff never had to interrupt the trial by arresting petitioner," Justice Black emphasized,

for the simple reason that after this statement petitioner never did ask any more questions along the line which the judge had forbidden. . . . The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.

Id.

Freedman suggests that *McConnell* permits a lawyer to disregard an adverse ruling by the trial Judge if the lawyer believes that such action is necessary to protect the record for appeal purposes. We cannot agree. *McConnell* stands only for the narrow proposition that an attorney's unfulfilled threat to violate a trial judge's order does not constitute an obstruction of justice summarily punishable as criminal contempt. *United States v. Seale*, 461 F. 2d 345, 363 (7th Cir. 1972). The instant case differs significantly from *McConnell*: Whereas Mr. McConnell complied with the trial judge's instruction, Mr. Freedman, in defiance of seven direct orders, proceeded to do precisely what the trial judge had commanded him not to do. *McConnell*, we conclude, does not govern this appeal.

Freedman also relies on *Morrissey v. National Maritime Union*, *id.* at 32. In that case, five days before the scheduled start of the trial counsel for one of the defendants learned that his client might require emergency surgery on the opening day of the trial. Counsel immediately advised the judge by telephone, requested an adjournment of the trial, and offered to obtain an affidavit from the treating physician. The judge replied that it was unnecessary to obtain such an affidavit or to advise plaintiff's counsel, because the adjournment would be denied. At the opening of the trial, the defendant's counsel moved for an adjournment or, in the alternative, for a severance, stating that his client was to undergo a serious operation. The judge denied both requests. The trial proceeded, and a substantial verdict was rendered in favor of the plaintiff.

The court of appeals declined to reverse on account of the denial of a continuance, principally because counsel at no time made an offer of proof concerning the material testimony that the hospitalized defendant would have given. While counsel sought to excuse this on the basis of the judge's statement on the telephone that there was no need to supply a medical certificate or to advise plaintiff's counsel since he was going to deny the continuance in any event, the court of appeals held that "this did not relieve counsel of his duty to protect the record." *Id.*, slip op. at 4424.

The appellant asserts that *Morrissey* establishes the necessity of his action in this case. Had he obeyed the trial judge's order, Freedman maintains, he, like the defendant's lawyer in *Morrissey*, might later have found the court of appeals unwilling to consider his challenge to the trial judge's ruling. We are not persuaded that *Morrissey* justifies Freedman's conduct.

Morrissey and the instant case are dissimilar in one critical respect. The trial judge in *Morrissey* never ordered

the defendant's lawyer to refrain from making an offer of proof that would have preserved the record. In fact, the judge never even advised the lawyer that it was unnecessary to make such an offer. The judge said only that it was unnecessary to obtain a physician's affidavit or to contact plaintiff's counsel. Defense counsel's failure to protect the record was entirely his own fault, resulting solely from his careless interpretation of the judge's statement. *Morrissey* does not address the question presented in this appeal, that is, whether an attorney's belief that certain action is necessary to protect the record justifies his violation of the judge's multiple direct orders.⁹

B.

We decline the appellant's invitation to consider the merits of the order that he violated. It is well settled that the invalidity of a court order generally is not a defense in a criminal contempt proceeding alleging disobedience of the order. *Walker v. City of Birmingham*, 388 U. S. 307

9. Freedman relies on several other cases that are also inapposite. In *Phillips v. Kitt*, 290 F. 2d 377 (D. C. Cir. 1961) (*per curiam*), counsel made a suggestion to the trial judge for the instruction of the jury. The judge adopted the suggestion, and so instructed the jury. On appeal, appellants complained about the supplemental instruction, but the court of appeals noted that counsel had failed to object or make further suggestions at the conclusion of the supplemental instruction. "We think he was under a duty to object," the court of appeals wrote, "and, even at the risk of incurring the displeasure of the trial court, to insist upon his objection. Having failed to do so, it is too late to urge this as error here." *Id.* at 378. The attorney in *Phillips* was not faced with a direct order of the trial judge; that case dealt only with an attorney's inexcusable failure to protect the record by noting an objection.

Similarly, in *Marrone v. United States*, 355 F. 2d 238 (2d Cir. 1966), *Andrews v. Olin Mathieson Chem. Corp.*, 334 F. 2d 422 (8th Cir. 1964), and *Sorrels v. Alexander*, 142 F. 2d 769 (D. C. Cir. 1944), appellate courts refused to consider an appellant's challenge to the trial court's exclusion of certain evidence because counsel had failed to make adequate offer of proof. In none of those cases, however, had counsel been ordered by the trial judge not to make an offer of proof.

(1967); *United States v. United Mine Workers*, 330 U. S. 258, 293-94 (1947). See generally *Latrobe Steel Co. v. United Steelworkers*, No. 76-1080, slip op. at 8 (3d Cir. Nov. 15, 1976). The issue as we see it is not whether the judge was correct in ordering Mr. Freedman not to state the reasons for his objection,¹⁰ but whether Mr. Freedman had the right to state the reasons for his objection in violation of an explicit order that he not do so under pain of criminal contempt.

Freedman argues that the danger of foreclosing appellate review of the trial judge's restriction of his method of cross-examination required him to violate the judge's order. Yet he has not cited a single case in which an appellate court has held that an attorney's compliance with a direct order of a trial court barred his client's raising an issue on appeal. Nor has our own extensive research disclosed such a case. The void, we are sure, is not inadvertent. A court of appeals could not penalize a litigant solely because his attorney fulfilled his well established obligation to comply with the orders of a trial judge. Cf. *Maness v. Meyers*, 419 U. S. 449, 474 (1975) (White, J., concurring). To conclude otherwise would require us to ascribe an irrationality to the appellate process which our knowledge of the law and our objective respect for the judicial system will not permit.¹¹

We do not dispute an attorney's right in trying a case to be contentious, fearless, and zealous in representing his client's interests. See *Offutt v. United States*, 348 U. S. 11,

10. Both Freedman and the trial judge referred to Freedman's disagreement with the judge's ruling as an "objection." We use the same term for the sake of consistency, but observe that the word "exception" is more appropriate. See *United States v. United States Fidelity & Guar. Co.*, 236 U. S. 512, 529 (1915).

11. See *In re Dellinger*, 461 F. 2d 389, 398 (7th Cir. 1972) ("if a trial judge prejudicially denies counsel an adequate opportunity to argue a point, appellate courts will reverse . . .").

13 (1954); *Sacher v. United States*, 343 U. S. 1, 13-14 (1952). As the Supreme Court has said, "it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts." *United States v. Sacher*, *supra*, at 9, quoted in *Maness v. Meyers*, 419 U. S. 449, 459 n. 7 (1975). But the case law establishes that a direct order of the trial judge fixes the limits of proper advocacy; the vigor permissible in representing a client's interests has never included the flouting of a judge's rulings. *Dunn v. United States*, 388 F. 2d 511, 513 (10th Cir. 1968); *In re Osborne*, 314 F. 2d 611, 615 (9th Cir. 1965). Disobedience is not an ingredient of contentiousness; defiance is not an element of zealousness.

The Supreme Court has recently reaffirmed counsel's obligation to comply with the orders of a trial judge. In *Maness v. Meyers*, *supra*, the Court held that an attorney is not subject to the penalty of contempt for advising his client, in good faith, to assert the fifth amendment privilege against self-incrimination in any proceeding embracing the power to compel testimony. The narrow holding in *Maness* was based on the peculiar nature of the fifth amendment privilege. Mr. Chief Justice Burger, writing for the Court, was careful to emphasize, however, the "basic proposition that all orders and judgments of courts must be complied with promptly." 419 U. S. at 458.¹² "This principle," he

12. The Chief Justice continued:

If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect. *Howat v. Kansas*, 258 U. S. 18, 189-190 (1922); *Worden v. Searls*, 121 U. S. 14 (1887). The orderly

wrote, "is especially applicable to orders issued during trial. E.g., *Illinois v. Allen*, 397 U. S. 337 (1970)." *Id.* at 459.

Such orders must be complied with promptly and completely, for the alternative would be to frustrate and disrupt the progress of the trial with issues collateral to the central questions in litigation. This does not mean, of course, that every ruling by a presiding judge must be accepted in silence. Counsel may object to a ruling. An objection alerts opposing counsel and the court to an issue so that the former may respond and the latter may be fully advised before ruling. . . . But, once the court has ruled, counsel and others involved in the action must abide by the ruling and comply with the court's orders. While claims of error may be preserved in whatever way the applicable rules provide, counsel should neither engage the court in extended discussion once a ruling is made, nor advise a client not to comply.

Id. (citation and footnote omitted). *Accord*, *Sacher v. United States*, *supra*, at 9; *United States v. Abascal*, 509 F. 2d 752, 754 (9th Cir.), *cert. denied*, 422 U. S. 1027 (1975) ("The ability of a trial judge to compel obedience to his orders is fundamental to the proper functioning of our system of justice."); *In re Dellinger*, 502 F. 2d 813, 816 (7th Cir. 1974), *cert. denied*, 420 U. S. 990 (1975)

12. (Con't.)

and expeditious administration of justice by the courts requires that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *United States v. Mine Workers*, 330 U. S. 258, 293 (1947).

419 U. S. at 458-59.

("[L]awyers are required to obey even incorrect orders; the remedy is on appeal.")¹³

The Seventh Circuit has held that one's belief that certain action is necessary to preserve claims for appellate review does not excuse violation of a direct order of the trial judge.¹⁴ In *United States v. Seale*, 461 F. 2d 345 (7th

13. See *In re Dellinger*, 461 F. 2d 389, 398-99 (7th Cir. 1972), in which the court considered contempt citations against the attorneys who had represented the defendants in the notorious Chicago Seven trial:

Many of the contempt specifications against the attorneys arise out of their persistence in continuing argument on motions and rulings after express orders by the trial judge to cease. With respect to these specifications, appellants contend that such persistence was warranted by the trial judge's refusal to hear reasonable argument from the defense prior to ruling. . . . [T]his principle . . . cannot be accepted as a general principle. If a trial judge prejudicially denies counsel an adequate opportunity to argue a point, appellate courts will reverse, and that alone will deter most judges from arbitrarily cutting off argument. . . . And where the judge is arbitrary or affords counsel inadequate opportunity to argue his position, counsel must be given substantial leeway in pressing his contention, for it is through such colloquy that the judge may recognize his mistake and prevent error from infecting the record. . . . However, this is not to say that attorneys may press their positions beyond the court's insistent direction to desist. On the contrary, the necessity for orderly administration of justice compels the view that the judge must have the power to set limits on argument.

14. The issue seems to arise infrequently. The Ninth Circuit was faced with a very similar situation in *Hallinan v. United States*, 182 F. 2d 880 (9th Cir. 1950), *cert. denied*, 341 U. S. 952 (1951). In that case, an attorney's line of questioning in cross-examining a witness was objected to by opposing counsel. The trial judge sustained the objection. The cross-examining attorney informed the judge that he considered the ruling erroneous, and went on to say that he would have to continue to ask the questions in order to "build a record." *Id.* at 886. He thereupon pursued the forbidden line of questioning. Each question was objected to, and each objection was sustained. The Ninth Circuit affirmed an order of criminal contempt, finding no justification in appellant's contention that he had to make a record.

We note that the attorney in *Hallinan* was never directly and explicitly ordered by the trial judge to cease asking question to

Cir. 1972), Bobby Seale, in defiance of the trial court's directive's, disrupted his own trial by insisting on his right to be represented by the counsel of his choice, or to represent himself. The trial judge held him in criminal contempt. On appeal, Seale contended that he was unaware that his sixth amendment claims were preserved for appellate review, and that his conduct was explicable by his desire to make a record. The Seventh Circuit held that Seale's reliance on *In re McConnell*, 370 U. S. 230 (1962), was misplaced, and rejected his contention.¹⁵ "[O]pen defiance of the trial court's directives to desist or disruptive persistence beyond all bounds of propriety would not be justified merely because Seale may have entertained the belief that some protest was called for," the court said. "Where there is such defiance or obstructive excess of persistence, belief in the necessity to register objections for the record may reduce the degree of culpability but does not exonerate." 461 F. 2d at 363 (footnote omitted).

If non-lawyer Seale's defiance of a judge's order was inexcusable, how much more so should be the conduct of appellant Freedman, a seasoned trial lawyer. We agree with the Seventh Circuit, and hold that a trial attorney's

14. (Cont'd.)

"build a record." The trial judge merely sustained continued objections to those questions. The Ninth Circuit's decision appears to have been based, at least in part, on the fact that the record was sufficiently definite to have permitted appellate review; the case therefore does not directly confront the issue before us as we have framed it: whether an attorney has the right to state the reasons for his exception to a trial judge's ruling in violation of an explicit order that he not do so under pain of criminal contempt. As we have indicated previously, we decline to consider whether the actual state of the record in the instant case obviated the need for Freedman's stating the reasons for his objection; we deem that inquiry irrelevant. As we read *Hallinan*, nothing that the court said suggests that had it addressed the precise issue in the instant case, it would have reached a result different from ours.

15. The court found *McConnell* inapposite for the reasons we have stated in Part IIA of this opinion.

belief that certain action is necessary to protect the record for appellate review does not excuse his deliberate defiance of the trial judge's explicit and repeated orders.¹⁶ The phrase "preserving the record for appeal" is not a talisman that absolves a lawyer from his usual obligation to comply with a trial judge's direct orders.

At oral argument in this court, counsel for Freedman offered another justification for the appellant's action. Freedman's disregard of the judge's order was necessary, he said, not only to protect the record, but also to persuade the trial judge to retract his restriction on Freedman's method of cross-examination. An appeal would provide an inadequate means of challenging the restriction, counsel asserted; the witness was cornered, and Freedman had achieved a momentum that probably could never be resumed at a new trial after an appeal. In the interest of seizing an irrecoverable opportunity, the argument concluded, Freedman could permissibly defy the judge's order and state the reasons for his objection.

Counsel relied on *Maness v. Meyers*, 419 U. S. 449 (1975), for this novel proposition. As we have already noted, *Maness* held that an advocate may not be held in contempt for advising his client, in good faith, to assert the fifth amendment privilege against self-incrimination in any proceeding embracing the power to compel testimony. In the course of its opinion, the Supreme Court observed that when a witness is ordered to reveal information during the course of a trial, compliance could cause irreparable injury because "appellate courts cannot always 'unring the bell' once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary con-

16. Proper conduct for Mr. Freedman would have been to say, "I shall comply with Your Honor's orders. Will Your Honor permit the record to show that I desired to state the reasons for my objection but did not do so in response to your explicit direction?"

sequence of totally repairing the error." *Id.* at 460. A witness in such a situation, said the Court, has the choice of complying with the order of resisting the order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.

Maness was based on the unique nature of the fifth amendment privilege. We find in that case no general rule that a trial court's order may be violated when the person at whom the order is directed determines that the appellate process is inconvenient. On the contrary, the Supreme Court reaffirmed the general obligation to comply with the orders of a trial court. "Remedies for judicial error may be cumbersome," the Court said, "but the injury flowing from an error generally is not irreparable, and orderly processes are imperative to the operation of the adversary system of justice." *Id.* Compliance with the trial judge's rulings may cause counsel to lose an advantage that never may be regained. But that is a small premium to pay to protect our dynamic judicial system from courtroom chaos.

III.

Mr. Freedman contends that his conduct did not amount to an obstruction of justice¹⁷ because he was merely doing in good faith what he deemed essential, in his client's interest, to preserve a point for appeal. We agree with appellant, as we must, that "before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedure there must be an actual obstruction of justice" *In re McConnell*, 370 U. S. 230, 234 (1962). *Accord*, *In re Little*, 404 U. S. 553, 555 (1972); *Ex parte Hudgings*, 249 U. S. 378, 383 (1919); *United States v. Proffitt*, 498 F. 2d

17. See *In re Oliver*, 333 U. S. 257, 275 (1948); *Jessup v. Clark*, 490 F. 2d 1068, 1071 (3d Cir. 1973); *United States v. Seale*, 461 F. 2d 345, 366-67 (7th Cir. 1972).

1124, 1128 (3d Cir.), *cert. denied*, 419 U. S. 1002 (1974). We also agree that "in close cases where the line between vigorous advocacy and actual obstruction defie[s] strict delineation, doubts should be resolved in favor of vigorous advocacy." *United States ex rel. Robson v. Oliver*, 470 F. 2d 10, 13 (7th Cir. 1972). *Accord*, *In re Dellinger*, 461 F. 2d 389, 398 (7th Cir. 1972). But the latitude allowed an attorney representing a client's interests does not extend to deliberate defiance of a judge's direct and explicit orders. We have not the slightest doubt that flouting a trial judge's commands is the essence of obstructing the administration of justice.

That Freedman may have been polite, respectful, and perhaps subdued in this disobedience is irrelevant; overt physical disorder is not necessary to obstruct the administration of justice. *United States v. Wilson*, 421 U. S. 309 314-15 (1975); *United States v. Proffitt*, *supra*, 498 F. 2d at 1128-29. Freedman's conduct was an affront to the trial judge's authority to control the proceedings in his own courtroom. An attorney who, in deliberate disregard of seven direct and explicit orders by the trial judge, pursues a course that he determines to be in the best interests of his client, offends the dignity and authority of the court and thereby obstructs the administration of justice. *United States v. Seale*, 461 F. 2d 345, 371 (7th Cir. 1972).¹⁸ To hold otherwise would be to strip trial judges of their power to supervise the proceedings before them, and to clothe counsel with the authority to conduct trials in whatever manner they deem appropriate. Furthermore, we note that

18. In *Seale*, the court said,

The unmistakable implication of *In re McConnell*, 370 U. S. 230, 235, 236, [(1962, discussed in Part IIA of this opinion)] . . . is that defiance of the court's order to cease questioning would have actually obstructed the proceedings. As governor of the trial, the trial judge must have the authority necessary to ensure the orderly and expeditious progress of the proceed-

Freedman's conduct was obstructive because it resulted in a wholly unnecessary and not insignificant delay of the trial. For this reason, too, we conclude that his conduct rose to the required level of disruptiveness. *In re Dellinger*, 502 F. 2d 813, 815 (7th Cir. 1974), *cert. denied*, 420 U. S. 990 (1975); *United States v. Proffitt*, *supra*, 498 F. 2d at 1129.

IV.

Freedman next contends that he lacked the requisite criminal intent. Relying on *United States v. Greyhound Corp.*, 508 F. 2d 529, 532 (7th Cir. 1974), and *In re Brown*, 454 F. 2d 999, 1006 (D. C. Cir. 1971), he argues that his conduct was not willful because he merely pursued a plausible though mistaken alternative in good faith. In those cases, however, the courts were dealing with the contemnors' assertions that the court order or rule they were charged with violating did not clearly cover their allegedly contumacious conduct. It was in response to the contemnors' arguments that they could not reasonably have been expected to know that the trial courts would consider their conduct contemptuous that the appellate courts said that "[w]illfulness, for purposes of criminal contempt, does not exist where there is a '[g]ood faith pursuit of a plausible though mistaken alternative.'" *United States v. Greyhound*, *supra*, 508 F. 2d at 532, *quoting In re Brown*, *supra*, 454 F. 2d at 1007. In the instant case, Freedman knew that the trial judge would regard his violation of the judge's order as contemptuous. The judge explicitly told him so four times.

We recognize, of course, that willfulness is an element of criminal contempt which must be proved beyond a rea-

18. (Cont'd.)

ings. His directives in exercise of this authority must be obeyed; otherwise the clear result would be courtroom chaos. 461 F. 2d at 371.

sonable doubt. *In re Williams*, 509 F. 2d 949, 960 (2d Cir. 1975); *United States v. Greyhound Corp.*, *supra*, 508 F. 2d at 531. We are also aware that no uniform standard of willfulness has been defined or applied in criminal contempt cases. See Dobbs, *Contempt of Court: A Survey*, 56 Cornell L. Rev. 183, 262-63 (1971). In the interest of providing sufficient protection for counsel's right to be "persistent, vociferous, contentious, and imposing" when acting on his client's behalf, *In re Dellinger*, 461 F. 2d 389, 400 (7th Cir. 1972), we adopt the Seventh Circuit's sensible standard for judging the minimum requisite intent for criminal contempt:

The minimum requisite intent is . . . defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful. . . . Of course, an actual design to subvert the administration of justice is a more grievous and perhaps more culpable state of mind, but proof of such an evil motive is unnecessary to establish the required intent.

United States v. Seale, 461 F. 2d 345, 368-69 (7th Cir. 1972). Accord, *In re Dellinger*, *supra*, 461 F. 2d at 400.

When we measure Freedman's conduct by this standard, we have no doubt that he acted with the minimum requisite intent. In view of his long and extensive experience as a trial lawyer, the well established obligation of an attorney to heed even the incorrect orders of a trial judge, the seven explicit and direct orders issued by the trial judge in this case, and the four unequivocal warnings that violation of those orders would be punished as criminal contempt, Freedman should reasonably have been aware that his conduct was wrongful. See *United States v. Wilson*, 421 U. S. 309, 315-16 & n. 7 (1975); *United States v. Leyva*, 513 F. 2d 744, 777 (5th Cir. 1975). He should

have known that during the course of a trial, an attorney's understanding of the law must yield, for the time being at least, to the judge's command.

We conclude our consideration of the contempt order in No. 76-2266 by emphasizing that the regrettable incident underlying the order embodies all of the elements necessary to support a summary criminal contempt conviction: Freedman's action was intentional, constituted misbehavior which caused an actual obstruction of the administration of justice, and occurred within the presence of the court. *United States ex rel. Robson v. Oliver*, 470 F. 2d 10, 12 (7th Cir. 1972); see *United States v. Harris*, 382 U. S. 162, 164 (1965); *In re Williams*, 509 F. 2d 949, 960 (2d Cir. 1975).

V.

The incident underlying the second contempt order (No. 76-2470) occurred approximately six weeks after the first incident, on November 9, 1976. Freedman was cross-examining Samuel F. Long, a black operating engineer who had testified on direct regarding his experiences with Local Union 542. Freedman marked Long's work record as an exhibit, and then began interrogating the witness about the record, apparently in an attempt to show that Long had received many work assignments through the local. When opposing counsel objected that Long's work history was beyond the scope of direct, the trial judge sustained the objection and restricted cross-examination to the two jobs about which Long had testified on direct. Appellant excepted to the trial judge's ruling.

Freedman resumed questioning the witness about his work record. Opposing counsel again objected. The trial judge sustained the objection and repeated his prior ruling. Appellant then began to make offers of proof of certain entries on Long's work record. "Mr. Freedman, I have

made my ruling," the trial judge told him. "You can have as a proffer, and I will accept as your proffer, that you would proffer any and everything in this record. It will be marked as a part of the record; and if I am in error, it will be available." Freedman read another entry from the work record in order, he said, to make an offer of proof; opposing counsel objected that "[a]ll Mr. Freedman is doing is reading word for word from the record." At that point the judge told Freedman to note only the dates of the entries that he desired to include in his offer of proof. Those particular entries would be on the record in their entirety, the judge said, because the work record itself, marked as an exhibit, would be a part of the record.

Freedman, however, went on to read another entire entry from the work record. "Just give us the days," the judge repeated. Appellant responded that he did not think that such a procedure was adequate to make an offer of proof, and began to read another entry. The judge reiterated his instruction to give only the dates of the entries. Appellant read another entire entry, and restated his belief that his action was necessary. Twice more the judge instructed Freedman to read only the dates of the entries. "I have to make an offer of proof," Freedman responded. "If Your Honor is going to hold me in contempt, I am sorry; but I want to do it." The judge directed him twice more to read only the dates. "I am directing you to give only the dates," the judge said, "and I will take notice and the Appellate Court can read and they can take notice of the entries," "I will have to do what I think is best for my client's interest," Freedman replied.

Freedman thereupon read five complete entries from the work record. Opposing counsel objected to this method of making an offer of proof and noted that "[i]t serves no purpose except to delay this litigation." "I have directed

Mr. Freedman to give the date of entries," the judge stated. Freedman read five more complete entries, and the objection was renewed. The judge repeated his direction for the ninth time. Freedman read seven more complete entries. When opposing counsel began to object again, the judge interrupted. "I have made my ruling," the judge remarked. "If Mr. Freedman wants to disregard it, I have made my ruling. You proceed, Mr. Freedman. You understand what my ruling was?" "I understand perfectly what Your Honor's ruling was," Freedman answered. After he read eight additional entries, Freedman indicated that he was finished with the work record.

The judge immediately called a recess until ten o'clock the next morning, and stated that at that time he would make findings regarding what he considered to be "a willful disregard of my order." The next morning, the judge informed the parties that a transcript of the preceding day's proceedings had not yet been prepared, and recessed court until 2:00 P. M. When court reconvened, the judge filed findings and a memorandum order holding Freedman in criminal contempt, and fining him \$500.¹⁹

On appeal from this criminal contempt order, Freedman again contends that his conduct was necessary to protect the record and to persuade the judge to retract his restriction on Freedman's cross-examination. He also claims that he lacked the requisite criminal intent because he acted in the good faith belief that his action was proper. Furthermore, he asserts that the trial judge's delay in filing the contempt order shows that Freedman's conduct did not constitute an actual obstruction of the administration of justice summarily punishable as criminal contempt; for this reason, appellant argues, and because the trial

19. The district court's Findings and Memorandum Order and his Order, Findings, and Fine of Contempt are set forth in Appendix B to this opinion.

judge allegedly adopted such an adversary posture with respect to him, he was entitled to a due process hearing before another judge.

VI.

For the reasons stated in Part II of this opinion, we reject appellant's contention that his conduct was justified by the need to protect the record and to persuade the trial judge to change his ruling on the scope of cross-examination.²⁰ Freedman was directed nine times to read only the dates of the work record entries that he desired to include in his offer of proof, yet he read twenty-eight complete entries in deliberate defiance of the judge's command. His belief that such action was necessary to protect the record for appellate review did not excuse his disregard of the trial judge's explicit, direct, and repeated instructions, nor did the inconvenience of the appellate process absolve Freedman from his obligation to comply with those instructions.

For the reasons stated in Part IV of this opinion, we also reject appellant's contention that he lacked the requisite criminal intent. In view of his extensive experience as a trial lawyer, the well established obligation of an attorney to heed even the incorrect orders of a trial judge, the nine explicit directions issued by the trial judge in this case, and Freedman's expressed understanding of the trial judge's instructions, Freedman should reasonably have been aware that his conduct was wrongful.^{20A}

20. The judge's ruling did no more than restrict the scope of the cross-examination to the testimony on direct examination. He did not preclude Freedman, as the judge's subsequent rulings confirmed, from calling the witness in support of the defendants' case.

20A. Freedman does not appear to contend that he was unfairly surprised by being cited for criminal contempt because the trial judge failed to warn him that his conduct was contemptuous. In any event, such an argument is without merit. We concede that

VII.

Freedman next contends that because the trial judge did not bring the contempt charge at the time the act was committed, there was no actual obstruction of the administration of justice to warrant summary punishment under Fed. R. Crim. P. 42(a). If summary punishment was really "necessary in order to achieve 'summary vindication of the court's dignity and authority,'" *Harris v. United States*, 382 U. S. 162, 164 (1965), quoting *Cooke v. United States*, 267 U. S. 517, 534 (1925), Freedman argues, the trial judge could not have delayed twenty-four hours in issuing his contempt order. According to the appellant, the trial judge's own conduct demonstrates that a finding of contempt should have been made only after notice and a hearing before another judge as required by Fed. R. Crim. P. 42(b).²¹

The Supreme Court considered virtually the same argument in *Sacher v. United States*, 343 U. S. 1 (1952), a case in which the trial judge awaited completion of the trial to punish defense counsel under Rule 42(a) for their contemptuous conduct during the course of the trial. The contemnors argued that the progress of the trial could no longer be obstructed by the time of its completion, and that summary action had become unnecessary. Therefore, the contemnors asserted, they could not be convicted or sen-

20a. (Cont'd.)

the practice of giving warnings is generally desirable. See *United States v. Seale*, 461 F. 2d 345, 366 (7th Cir. 1972). But when the manner in which the court treats the matter would indicate to any lawyer that the judge considers the conduct contemptuous, warnings are not essential. *United States v. Schiffer*, 351 F. 2d 91, 95 (6th Cir. 1965), cert. denied, 384 U. S. 1003 (1966). Freedman clearly understood the judge's perception of his conduct: "If Your Honor is going to hold me in contempt, I am sorry," he said, "but I want to do it."

21. At the time that the trial judge made his findings and entered his order, appellant moved for a hearing before another judge and a jury. The motion was denied.

tenced except after notice and a hearing before another judge as provided in Rule 42(b).

The Court, in an opinion by Mr. Justice Jackson, rejected the argument that a trial judge's failure to act at once upon the occurrence of a contemptuous incident deprives him of the power to proceed under Rule 42(a). "We think 'summary' as used in this Rule does not refer to the timing of the action with reference to the offense," the Court said, "but refers to a procedure which dispenses with the formality, delay and digression that would result from . . . all that goes with a conventional court trial." *Id.* at 9. Indeed, the Court recognized the dangers of immediate action:

Reasons for permitting straightway exercise of summary power are not reasons for compelling or encouraging its immediate exercise. Forthwith judgment is not required by the text of the Rule. Still less is such construction appropriate as a safeguard against abuse of the power.

. . . If we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment. We think it less likely that unfair condemnation of counsel will occur if the more deliberate course be permitted.

Id. at 9-11. The Court held that if the trial judge deems immediate action inexpedient, he may defer judgment on contemptuous conduct until the completion of the trial without extinguishing his power to proceed summarily under Rule 42(a).²²

22. Accord, *United States v. Schiffer*, 351 F. 2d 91, 94-95 (6th Cir. 1965), cert. denied, 384 U. S. 1003 (1966); *In re Osborne*, 344 F. 2d 611, 616 (9th Cir. 1965); *United States v. Galante*, 298 F. 2d 72, 76 (2d Cir. 1962).

Although we note that the continuing vitality of *Sacher* has been questioned,²³ the case has not been overruled. And although the commentators have disapproved the procedure sanctioned in *Sacher*, see, e.g., 8B J. Moore, *Federal Practice* ¶ 42.04[2] (1976); 3 C. Wright, *Federal Practice and Procedure* § 707, at 169 (1969), the procedure employed in the instant case—a delay of twenty-four hours—is not subject to the same criticism. See 3 C. Wright, *supra* § 707, at 168 (“[S]ome delay is permissible in invoking the summary contempt power, since the court may wish to reflect on the necessity of its exercise and time will be needed to prepare the contempt certificate.”) The judge in this case did not continue with the trial after Freedman defied his orders. Instead, he immediately recessed court and awaited preparation of the transcript. The trial did not resume until the contempt order was filed. Under these circumstances, we cannot conclude that the trial judge’s twenty-four hour delay demonstrated that summary punishment was unnecessary. The recess was cautionary, judicious, and laudable. See *Sacher*, *supra*, at 9-11; *id.* at 41 (Frankfurter J., dissenting) (“[P]ower to cite for contempt summarily is not lost by taking a reasonable, brief time for judicious consideration whether such drastic action is necessary in a pending trial.”); *MacInnis v. United States*, 191 F. 2d 157 (9th Cir. 1951), *cert. denied*, 342 U. S. 953 (1952) (overnight delay permissible); *Hallinan v. United States*, 182 F. 2d 880 (9th Cir. 1950), *cert. denied*, 341 U. S. 952 (1951) (same). We decline to hold that the trial judge’s circumspection in dealing with the contempt, and his caution in awaiting preparation of a transcript before drafting his findings, deprived him of the power to proceed under Rule 42(a).²⁴

23. See, e.g., *Jessup v. Clark*, 490 F. 2d 1068, 1072 n. 5 (3d Cir. 1973). But see cases cited in note 22 *supra*.

24. Freedman also contends that his conduct did not amount to an obstruction of justice because he was merely doing what he

Finally, Freedman argues that although the trial judge was not personally attacked, he assumed an adversary attitude toward the appellant that disqualified him from adjudicating the contempt. Appellant points to the judge’s “acid and sarcastic” statements in his Findings and Memorandum Order, see Appendix B, to the effect that the judges of the Court of Appeals have the capacity to read and understand the English language, that Freedman’s conduct was defiant, and that Freedman’s action amounted to an assumption of judicial responsibilities. Relying on cases holding that the personal embroilment of the trial judge requires nonsummary disposition of a contempt charge,²⁵ Freedman asserts that he was entitled to a hearing pursuant to Fed. R. Crim. P. 42(b).

The record does not support the allegation that the judge became personally embroiled with the appellant and that he was therefore unable to sit impartially in judgment on the contempt charge. Freedman concedes that his conduct did not vilify the judge, and we cannot agree that the judge’s comments demonstrate a bias against Freedman. The judge’s description of appellant’s conduct was neither acid nor sarcastic; it was simply accurate. The trial judge exhibited patience and restraint, and did his utmost to preserve order and decorum; he did not engage in wrangling or bickering, and used the summary contempt power only as a last resort. See *In re Williams*, 500 F. 2d 403, 405 (2d Cir. 1974), *cert. denied*, 419 U. S. 1107 (1975); *United States v. Schiffer*, 351 F. 2d 91, 95 (6th Cir. 1965), *cert. denied*, 384 U. S. 1003 (1966). Compare *Taylor v. Hayes*,

• 24. (Cont’d.)

deemed essential, in his client’s interest, to preserve a point for appeal. For the reasons stated in Part III of this opinion, we reject that contention.

25. E.g., *Offutt v. United States*, 348 U. S. 11 (1954); *United States v. Meyer*, 462 F. 2d 827 (D. C. Cir. 1972).

418 U. S. 488 (1974); *Mayberry v. Pennsylvania*, 400 U. S. 455 (1971). Appellant mistakes judicial disapproval for personal pique. A judge who objectively expresses his antipathy toward contumacious conduct does not thereby disqualify himself from adjudicating the contempt under Rule 42(a). Under the circumstances of this case, we see no need for another proceeding to adjudicate what one judge has already witnessed. Summary disposition, we hold, was appropriate.

VIII.

The orders of the district court will be affirmed.

APPENDIX A

THE COURT: The record will speak for itself.

I have advised Mr. Freedman to not state on the record any further the basis for his objection.

I have advised him—

MR. FREEDMAN: I didn't state any basis for my objection yet.

THE COURT: Mr. Freedman, please permit me to finish. When I am ready to hear from you, I will let you know, and when I am finished I will let you know.

I have advised him to not state as he insisted he would, contrary to my instructions, the basis for his objection to certain rulings I have made. I consider his insistence that he would state the basis, though I have advised him not to, to be a wilful, deliberate act done not isolated in the heat of trial but rather a deliberate, continuous and repeated act which is in violation of the rule issued by this Court and which constitutes the basis of a criminal contempt violation under Rule 42, conduct which takes place in the presence of the judge over which a summary disposition would be appropriate.

I have sent for the Marshals. In 13 years I have never had to hold a lawyer in contempt, and I don't welcome that.

I do not believe that a rule of the Court can be flouted. The issue is whether I am the judge, and the Court will conduct the proceedings or whether it will be done at Mr. Freedman's whim.

Now, I am giving him the last opportunity. I am directing him to not state on the basis of this record his reasons for his objections on the ruling I have made, and it is up to him.

MR. FREEDMAN: Is Your Honor permitting me to speak now?

THE COURT: I am permitting you to speak, and I have told you what my position is.

MR. FREEDMAN: I deem it my responsibility under the law when I make an objection to give the reason for the objection. I have done this all of my trial life, and I consider it not only my right to do it but my duty to do it.

As I said to Your Honor before, I meant no disrespect in any way, and representing my client's interests I have to do it to the best of my judgment.

I don't intend to be subservient, but I don't intend to be disrespectful, and I am doing what the law requires me to do to state the reasons for my objections as I state the objections. If Your Honor doesn't want to hear it, then it is for the benefit of the appellate court.

THE COURT: I have told you, Mr. Freedman, that on the issue which we have just discussed that I don't want to hear the reasons for your objections, and I am directing you to proceed to your next question.

Now, if you want to state the reasons for your objections, I will consider that to be a violation of my order, a violation of Rule 42, and criminal contempt.

MR. FREEDMAN: Well, as I understand the law and as I son for my objection in addition to my objection. I think the appellate court has stated—

THE COURT: Mr. Freedman—

MR. FREEDMAN: You said you would give me an opportunity to be heard, Your Honor.

THE COURT: So it is clear, Mr. Freedman, I am directing you to proceed to your next question and not to state understand my legal responsibilities, I must state the rea- your reasons for objecting to my last ruling. Now it is your choice.

MR. FREEDMAN: I must state the reasons for my objection, and they are as follows:

This witness has not only contradicted himself but it is an absolute conflict between what he said on the stand here and what he said in his deposition, and that is the reason for my objection. I will read to you the part that I think is an absolute conflict.

To repeat some of the questions at the bottom of page 60:

"Q. Who made that determination?

"A. Which determination?

"Q. That money should be withheld?

"A. The Federal Government.

"Q. Was it because of Local 542's activity?

"A. I can't say that."

That is a direct conflict of what he said from the stand here, and that is my reason.

THE COURT: All right. I consider this to be a wilful violation of my ruling.

I have taken into full consideration the cases in this circuit such as *United States of America vs. Profitt*, 498 F. 2d, 1124; *United States vs. Schiffer*, 351 Fed. 2d, 91, and the whole series of cases which are discussed here.

I think this is wilful, deliberate misconduct in court, a wilful, deliberate refusal to comply with an order of the Court.

I find that Abraham Freedman is guilty of criminal contempt, and I sentence him to 30 days. I will give him an opportunity, if he desires, to file an appeal on that. Otherwise the Marshals can commit him.

Mr. Freedman, you can do whatever you wish.

MR. FREEDMAN: I have already done it.

THE COURT: I will give you the right to challenge my sentence. I will give you the right to appeal. I think it is a wilful violation, and it is in contempt.

MR. FREEDMAN: Well, I disagree with Your Honor on the law, and I disagree with the other statements that Your Honor made that I was in continuing contempt. I have not been in contempt of this Court at any time.

THE COURT: I find Mr. Freedman in contempt, and I sentence him to 30 days. I will permit him to challenge this in any way he wishes, and if he requests I would not hold him in the custody of the Marshal until he has pursued whatever remedies he desires to pursue in this case. Otherwise, if he doesn't request that, he will be committed forthwith.

MR. FREEDMAN: If I don't request what?

THE COURT: If you are requesting to not be put into the custody of the Marshal I will not put you in the custody of the Marshal as a matter of courtesy, but not as a matter of right.

MR. FREEDMAN: I certainly don't want to be put in the custody of the Marshal or anyone. I don't want to be put under any restraint. I am not withdrawing from anything I said. I think I am right.

THE COURT: Mr. Freedman, you have the choice to take an appeal from my ruling—

MR. FREEDMAN: That's what I will do.

THE COURT: Do you want to go into custody or wait until judgment is entered?

MR. FREEDMAN: Or wait until what?

THE COURT: Wait until judgment is entered. One will be entered in about ten minutes.

MR. FREEDMAN: That's up to Your Honor.

THE COURT: All right. You will go into custody of the Marshal.

—
(Recessed at 2:37 P. M.)

—
(In court, 3:17 P. M.)

(Also Present: Charles Sovel, Esq. for Abraham E. Freedman, Esq.)

THE COURT: Mr. Freedman, would you come to the bar of the court, please.

(Mr. Freedman at bar).

THE COURT: In accordance with Rule 42 I have made my prerequisite findings, order and commitment of contempt which I sign and give to the Clerk and which I will ask the Clerk to file forthwith and make copies available to Mr. Freedman and the other parties in this case. There is no need for me to read it. It speaks for itself.

Mr. Freedman, I am, under this order, granting you the right to be on your own recognizance to challenge the validity of this order and you may proceed in every way you wish.

This case will be recessed until Tuesday morning.

MR. FREEDMAN: You mean I am released pending appeal?

THE COURT: You are on your own recognizance to challenge the validity of this order and—

MR. SOVEL: Your Honor—

THE COURT: I am sorry. Yes, sir.

MR. SOVEL: If Your Honor please, my name is Charles Sovel. I am here with Mr. Freedman.

MR. FREEDMAN: He is my partner.

THE COURT: I remember Mr. Sovel quite well.

MR. SOVEL: I haven't had—

THE COURT: Of course you haven't. No one had an opportunity to see it. If you have any questions or Mr. Freedman has any questions on this order I will be in chambers and I will be pleased to talk to you or to talk to you and Mr. Freedman, but he is on his own recognizance.

In 13 years I never held a lawyer in contempt. I regret deeply that I was presented with an option for which there was no rational alternative in my view.

So that the order has been signed. He is on his own recognizance.

The order will be entered of record forthwith, and you will get copies.

APPENDIX B

FINDINGS AND MEMORANDUM ORDER

Five weeks ago, during the afternoon of Tuesday, September 28, 1976, I found Abraham E. Freedman, Esquire, guilty of criminal contempt committed in the actual presence of the court, and pursuant to Rule 42(a) of the Federal Rules of Civil Procedure he was sentenced to thirty (30) days. The service of the sentence was deferred. He was placed on his own recognizance to challenge the validity of that order. The matter is now before the Court of Appeals for the Third Circuit and it is due for argument in December of 1976. The notes of testimony of September 28, 1976, and my opinion of October 6, 1976 related to the contempt finding are hereby incorporated as an analysis of what I deem to be the relevant law pertaining to the Federal Rules of Criminal Procedure.

I had hoped [fervently] that the previous contempt finding and sentence would cause Mr. Freedman to thereafter proceed within the confines of professional conduct required of counsel. Unfortunately, Mr. Freedman's conduct has again reached the level of such defiant and contumacious refusal to comply with the trial rulings of the Court that it is regrettably necessary to determine whether he is again guilty of criminal contempt in violation of Rule 42(a) of the Federal Rules of Criminal Procedure.

To put the instant factual issue in context, on the morning of November 9, 1976 the plaintiffs put on the stand Samuel Franklin Long as a witness for direct examination. In substance he was questioned about his work experience as to the equipment which he had operated and as to his visit to a site where persons were being trained to use land moving equipment.

The instant problem pertains to whether Mr. Freedman willfully defied my ruling as to the scope of cross-examination which I would permit of Mr. Long. To put the matter in its factual context, Mr. Freedman had marked as Document U-186 the work record of Samuel Franklin Long as kept by the Union. It pertained to events which took place subsequent to April, 1965 and thus subsequent to the two specific job situations at Morrisville and Delaware about which Mr. Long had testified. The work record of an operating engineer is substantially different than the normal work record of an industrial employee. As an example, Mr. Long's work record on U-186 has 112 separately dated entries which makes specific references to separate jobs on which he worked. Since plaintiff had not made reference to work record U-186, I ruled that reference to that document was not permissible on cross-examination. When Mr. Freedman attempted to use this work record as to events subsequent to 1965, plaintiff's counsel, Mr. Reinstein, noted:

"Objection, Your Honor. Mr. Long's work history in this work record is beyond the scope of direct."

My ruling was:

"THE COURT: I will sustain objections about his work record on matters other than the Morrisville and Delaware jobs, which are the only things he was questioned about on direct examination." [N. T. 6517]

"THE COURT: Mr. Freedman, just so that you will understand the nature of my ruling, anything which is in U-186, if you question the witness about those transactions unless they pertain to the only two jobs of which this witness has testified, I will sustain an objection thereto. And you have an exception.

So it is not necessary for you to read through these several pages." [N. T. 6518]

My purpose in limiting the form of cross-examination was obvious. At this point, ten months after the trial began, I did not want the transcript to be unduly lengthened with the reading to the court stenographer of a whole series of notations which I had precluded from cross-examination. Since the document was already marked it was part of the trial record for me or an appellate court to review. Attempting to further protract this case, Mr. Freedman proceeded to say what his offer of proof was. From my experience with him in the past where extended offers of proof were made and statements from documents which have already been marked as a part of the record have been read in for pages and pages of testimony, I did not want this trial to be further unnecessarily protracted. I advised him that he could proffer anything in U-186, either the entire statement or selected portions, and that he should note the dates of the transactions as given on U-186 and then "the record will speak for itself." (6520) I directed him to give merely the dates of the entries, since obviously a reference to the dates would reveal the issue or factual statement for the proffer of proof which Mr. Freedman claims he wanted to make. He was warned five times to not continue reading into the record matters beyond the date of the entry. On the sixth occasion I said:

"THE COURT: Mr. Freedman, I am giving you the opportunity to make your offer of proof; and your offer of proof is that you would read into the record certain specific entries which I noted on certain days. That is all I have to have, and automatically that is incorporated in the record.

But what I don't want, Mr. Freedman, is to just have a whole series of entries read into the record because I have already ruled that they are precluded because they are not within the scope of the direct.

So I am trying to accommodate you and give you maximum latitude by getting you to note the dates.

And as I have said before, my ruling applies to all of the entries here."

He continued to flout my order, even after the eighth warning, by claiming "I've got to tell the Court of Appeals of what my offer of proof is, because neither Your Honor or the Appellate Court will know what it means when you read it" (referring to the docket entries). (6525) I am confident the judges of the Court of Appeals are endowed by their creator with the capacity to read the English language and to understand it. We need not take hours of testimony while Mr. Freedman reads entries which are *already* a part of the record. I gave him fifteen opportunities to give the record entries by merely noting the alleged date of the entry which he wanted to use on the work record, so that we could therefore proceed. For fifteen times he *willfully, purposely*, and in a most deliberate fashion refused to follow my order as to what should be done in his alleged proffer of proof but continued to proceed in his own fashion. More than an hour of time was taken spanning many pages of testimony and in deliberate defiance of my trial ruling.

If Mr. Freedman's defiant conduct is to be tolerated or sanctioned, this trial will never end. The doctrines I stated in my October 6, 1976 Memorandum are equally applicable to the events of November 9, 1976:

"Mr. Freedman's conduct was so egregious that to tolerate it the judicial process would degenerate to whatever might be the personal whims of counsel on any particular day. To grant him the latitude he seeks, one might as well have counsel wear the robes, ascend the bench and then make irrevocable rulings while the trial judge patiently awaits the command of

counsel. A court trial is not a process in anarchy to be engineered by trial counsel; rather it is an effort to try the case within the parameters of the historic role where there is always some semblance of order and rationality."

Mr. Freedman's persistent defiance must be put in the context of an already protracted trial which could be extended unlimitedly if counsel is granted the latitude to go on endlessly reading into the record those matters which have *already* been precluded *and* which are already a matter of record. In such a context Mr. Freedman could have extended for three or four hours the "cross-examination" of Mr. Long on matters which had already been precluded.

The conduct of Mr. Freedman has been so contumacious and in such willful defiance of precise court rulings that it is difficult to conceive of such actions emanating from any rational person who has been trained in the law. Thus, the only explanation for such conduct is that Mr. Freedman is deliberately pursuing a course whereby he desires to use contumacious and contemptuous conduct as a basis to delay completion of this trial by reason of this Court having to impose criminal sanction commensurate with the magnitude of his breach of professional conduct. Though I find that his conduct was deliberate, willful, and constitutes a contempt in the actual presence of the court and in violation of Rule 42(a) of the Federal Rules of Criminal Procedure, in this instance I refuse to impose the type of sanction which would be permissible, an additional criminal sentence, because it would further delay this trial. I therefore am imposing on Mr. Freedman a fine in the amount of five hundred dollars (\$500.00). It is imposed with the full awareness that the fine should bear some reasonable relation to the nature and gravity of the con-

tumacious conduct. [U. S. v. Conole, 365 F. 2d 306, 308 (3d Cir. 1966)].

By THE COURT:

/s/ A. LEON HIGGINBOTHAM, JR.

J.

ORDER, FINDINGS AND FINE OF CONTEMPT

On the afternoon of Tuesday, November 9, 1976, Abraham E. Freedman, Esquire, as counsel for one of the defendants in the above-captioned case, deliberately violated the rulings of the Court as noted in the attached Memorandum and at pp. 6518 to 6532 of the Notes of Testimony. Such deliberate and willful conduct constituted contempt in the actual presence of the Court and was in violation of Rule 42(a) of the Federal Rules of Criminal Procedure. He is fined five hundred dollars (\$500.00) and required to pay the fine to the Clerk of Court within seven days.

By THE COURT:

/s/ A. LEON HIGGINBOTHAM, JR.

J.

APPENDIX G.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-2266 and 76-2470

COMMONWEALTH OF PENNSYLVANIA

and

RAYMOND WILLIAMS, WILLIE McKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., AREL BROWN-LEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD and FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated

v.

LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS; OPERATING ENGINEERS JOINT APPRENTICESHIP AND TRAINING COMMITTEE OF PHILADELPHIA, EASTERN PENNSYLVANIA, and the STATE OF DELAWARE;

and

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC., CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, UNITED CONTRACTORS ASSOCIATION, and PENNSYLVANIA EXCAVATING CONTRACTORS ASSOCIATION, on their own behalf and on behalf of all others similarly situated

and

GLASGOW, INC., on its own behalf and on behalf of all others similarly situated,

ABRAHAM E. FREEDMAN, ESQUIRE,

Appellant

(D. C. Civil Action No. 71-2698)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ROSENN, FORMAN and GARTH, *Circuit Judges***Judgment.**

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court filed on September 28, 1976 and November 10, 1976, be, and the same are hereby affirmed. Costs taxed against appellant.

ATTEST:

THOMAS F. QUINN,
Clerk

February 7, 1977

APPENDIX H.

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 76-2266 and 76-2470

**COMMONWEALTH OF PENNSYLVANIA and
RAYMOND WILLIAMS, et al.****v.****LOCAL UNION 542, INTERNATIONAL UNION OF
OPERATING ENGINEERS, et al.****ABRAHAM E. FREEDMAN, Appellant**

SUR PETITION FOR REHEARING.

**Present: SEITZ, Chief Judge, FORMAN, VAN DUSEN,
ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS,
and GARTH, Circuit Judges**

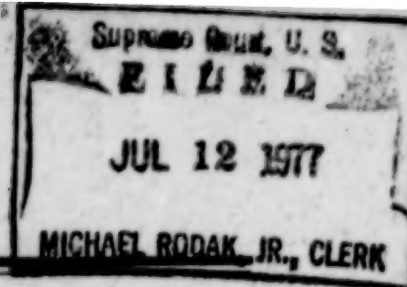
The petition for rehearing filed by Abraham E. Freedman, Appellant, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

**MAX ROSENN,
Judge**

Dated: March 14, 1977

No. 76-1581



In the Supreme Court of the United States

OCTOBER TERM, 1977

ABRAHAM E. FREEDMAN, PETITIONER

v.

HONORABLE A. LEON HIGGINBOTHAM, JR.,
JUDGE OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
WILLIAM C. BROWN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1581

ABRAHAM E. FREEDMAN, PETITIONER

v.

HONORABLE A. LEON HIGGINBOTHAM, JR.,
JUDGE OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A27-A71) is reported at 552 F. 2d 498. The findings and orders of the district court (Pet. App. A3-A26) are reported at 73 F.R.D. 544 and 551.

JURISDICTION

The judgment of the court of appeals (Pet. App. A72-A73) was entered on February 7, 1977. A petition for rehearing was denied on March 14, 1977 (Pet. App. A74). The petition for a writ of certiorari was not filed until May 12, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an attorney may properly be held in criminal contempt for continuing to pursue a course of conduct he believes to be in his client's interest, in defiance of repeated orders of the district court to cease.

STATEMENT

Petitioner, an attorney, was sentenced to 30 days' imprisonment and fined \$500 for two episodes of contempt during a bench trial. See Fed. R. Crim. P. 42(a). Both contempt citations were based upon petitioner's failure to obey direct orders of the district judge during a lengthy civil trial.¹

1. The first instance of contempt occurred on September 28, 1976. Petitioner was cross-examining Bennett O. Stalvey, Jr., a witness for the plaintiffs who had executed an affidavit that was appended to plaintiffs' complaint (Pet. App. A30). Petitioner began to read verbatim extensive portions of Stalvey's pretrial deposition, which allegedly contradicted a statement in the affidavit (Pet. App. A31). After petitioner had read 16 questions and 16 answers from the deposition without pausing to address the witness on the stand, opposing counsel objected. He argued that no inconsistency had been shown and moved that "any reading exercises be stopped" (*ibid.*). The trial judge asked petitioner whether he had any specific inconsistency to call to the witness's attention and inquired how much more petitioner intended to read. Petitioner responded "[a] couple more" (*ibid.*).

¹The trial began on January 19, 1976, and is still in progress. The plaintiffs contend that the defendants, including Local 542 of the International Union of Operating Engineers (represented by petitioner), discriminated against the plaintiff class on the basis of race and illegally denied them employment opportunities. See Pet. App. A30.

Petitioner proceeded to read five more questions and answers without asking the witness a question. The court interrupted petitioner and told him that the pending objection to continued reading of the deposition had been sustained (*ibid.*). Noting that "it is impossible to focus on a multi-phase series of questions" (*ibid.*) on cross-examination, the court told petitioner that he would permit him to proceed further only by asking the witness a question and following up that question with a specific reference to any claimed inconsistency in the deposition.

Petitioner announced that he would state the reasons for "objecting" to the court's ruling. The following colloquy then ensued (Pet. App. A32-A33):

THE COURT: I am directing you not to state the basis of your objection. Whatever you have, as a matter of law, as a basis of your objection, you will be the beneficiary of. Now, we will just deter what I think is [an] irrational cross-examination process. So I have made my ruling.

MR. FREEDMAN: I am afraid I have to give the basis for my objection.

THE COURT: All right. You may disregard my direction. If you give the basis when I told you not to, I am going to send for the marshal and hold you in contempt.

MR. FREEDMAN: You can send for the marshal right now, because I am going to give the basis for my objection.

THE COURT: I am directing you, as an officer of this Court not to state the basis of your objection. Whatever basis you have, you will have the benefit of claiming it. And if you disregard that, I am going to hold you in contempt.

MR. FREEDMAN: What I have to say, I want to say, not only for Your Honor, but for the Appellate Court if there happens to be a review. I am going to state it.

THE COURT: Just wait a minute. We will take a five-minute recess. I will send for the marshal.

Following a brief recess, the court twice more ordered petitioner not to state the reasons for his disagreement with the ruling and admonished him that he would consider a violation of the order to be criminal contempt (Pet. App. A33). Petitioner stated that he considered it his "responsibility under the law" to give his reasons (*ibid.*). Petitioner then disregarded the judge's order and stated that there was a direct contradiction in Stalvey's statements; he read verbatim several questions and answers in the deposition—which were among those previously read into the record—to demonstrate that alleged conflict. When petitioner had finished, the court held him in contempt; the court later filed an opinion and the necessary certificate (Pet. App. A3-A19).

2. On November 9, 1976, petitioner was cross-examining Samuel F. Long, an operating engineer who had testified for the plaintiffs, about several experiences he had had with petitioner's client, a union. Petitioner marked Long's work record as an exhibit and began interrogating the witness about that document. The district court sustained an objection to this line of questioning, ruling that it was beyond the scope of direct; the court instructed petitioner to confine his cross-examination to the incidents brought out on direct examination. Petitioner excepted to the ruling (Pet. App. A50).²

²The exception was unnecessary. Fed. R. Civ. P. 46.

Petitioner disregarded the court's decision; he resumed questioning the witness about the work record (*ibid.*). Opposing counsel again objected, the court repeated its prior ruling, and petitioner began to make "offers of proof" consisting of verbatim readings of entries on Long's work record (*ibid.*). The court stated that the work record would be received in its entirety as an offer of proof and that further reading should be discontinued.

Petitioner continued to read from the work record. After opposing counsel again objected, the court ordered petitioner to note only the dates of the particular entries he desired to include in his offer of proof; the court once more told petitioner that the work record was itself an offer of proof (Pet. App. A51). Petitioner continued reading verbatim for more than an hour, despite numerous warnings from the court to cease (Pet. App. A24-A25, A51-A52).

When petitioner had finished, the court recessed the trial (Pet. App. A52). In an opinion filed the following day the court found petitioner in contempt for willfully disobeying its orders (*id.* at A20-A25). The court held that petitioner's deliberately obstreperous conduct was an effort to delay the trial by "endlessly reading into the record those matters which have *already* been precluded *and* which are already a matter of record" (*id.* at A24; emphasis in original).

3. The court of appeals affirmed (Pet. App. A27-A71). In a thorough opinion upon which we rely, it held that a lawyer must obey the court's orders even though it believes them to be incorrect, and that the remedy for incorrect decisions by a trial court is reversal on appeal rather than defiance.

ARGUMENT

Petitioner's conduct during the civil trial far overstepped the bounds of professional representation of a client's interests. We agree with petitioner that an attorney may make known his objections to a court's rulings and may seek to protect his client's rights; the court of appeals so held (Pet. App. A40). But once the court has ruled, an attorney, like all others present in the courtroom, must obey the court's ruling and seek his remedy on appeal. Petitioner did not do so.

"[A]ll orders and judgments of courts must be complied with promptly." *Maness v. Meyers*, 419 U.S. 449, 458. Any other practice would "frustrate and disrupt the progress of the trial with issues collateral to the central questions in litigation." *Id.* at 459. See also *Geders v. United States*, 425 U.S. 80, 87; *Sacher v. United States*, 343 U.S. 1, 9.

There was no need for petitioner to comport himself as he did. His belief that he needed to state reasons for excepting to the court's order was wrong (Fed. R. Civ. P. 46), and there was no need to read aloud portions of a document that was already in the record as an offer of proof. But, beyond that, an attorney has no privilege to insist on proceeding according to his own view of proper procedure, and that is so even if the judge turns out to be wrong. In the courtroom someone must have the last word, and that word belongs to the judge rather than to the lawyers. Once the court here informed petitioner that he had preserved his points for appeal, his duty was to desist and obey the court's order.³

³As the court of appeals pointed out (Pet. App. A40), moreover, it is never necessary to disobey a court's order to preserve a point for appeal. Petitioner relies on *In re McConnell*, 370 U.S. 230,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
WILLIAM C. BROWN,
Attorneys.

JULY 1977.

and *Morrissey v. National Maritime Union of America*, 544 F. 2d 19 (C.A. 2), to support his claim that obedience to a trial court's order may result in waiver of a client's rights on appeal, but these cases do not support him. In *McConnell* this Court reversed the criminal contempt conviction of an attorney who, after being ordered not to make an offer of proof, threatened to but *did not* make the offer. *McConnell* stands for the proposition that an attorney's unfulfilled threat to violate the judge's order is not an obstruction of justice punishable as criminal contempt. In *Morrissey* the court of appeals found that counsel had waived an issue because of his failure to make an offer of proof concerning an absent witness's testimony. *Morrissey* is plainly inapposite, however, because the trial judge in that case never ordered counsel to refrain from making such an offer of proof; nor, for that matter, did the district court here bar petitioner's offer of proof. It ruled, instead, that petitioner already had made an offer of proof and need not read the written document aloud.